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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

NO. 138.

THOMAS BARDON, *Appellant*,

vs.

THE LAND & RIVER IMPROVEMENT COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

BRIEF FOR APPELLANT.

W. C. Silverthorn, M. A. Hurley, E. C. Ryan ~~& Jones,~~
Counsel for Appellant.

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IN THE

Supreme Court of the United States.

THOMAS BARDON,

Defendant and Appellant,

vs.

THE LAND AND RIVER IMPROVEMENT COMPANY,

Complainant and Respondent.

BRIEF FOR APPELLANT.

I.

ABSTRACT OF THE CASE AND QUESTIONS INVOLVED.

A.

This is an appeal from the circuit court of the United States for the Western District of Wisconsin, brought to

reverse the judgment of the District Judge before whom the case was tried.

It was claimed upon the argument in the Circuit Court that this is a suit in equity, brought by the complainant under the following section of the revised statutes of Wisconsin:

"Section 3186. Any person having the possession and legal title to land may institute an action against any other person setting up a claim thereto, and if the plaintiff shall be able to substantiate his title to such land, the defendant shall be adjudged to release to the plaintiff all claim thereto, and to pay the costs of such action, unless the defendant shall, by answer, disclaim all title to such land, and give a release thereof to the plaintiff, in which case he shall recover costs, unless the court shall otherwise order. It shall be sufficient to aver in the complaint in such action the nature and extent of the plaintiff's estate in such land, describing it as accurately as may be, and that he is in possession thereof, and that the defendant makes some claim thereto, and to demand judgment that the plaintiff's claim be established against any claim of the defendant, and that he be forever barred against having or claiming any right or title to the land, adverse to the plaintiff; and the defendant, if he do not so disclaim and release, may answer any matter in denial of the plaintiff's claim, title, or possession, or which, if proved, will establish his own, and judgment shall be rendered according to the rights of the parties. And any person not having such title or possession, but being the owner and holder of any lien or incumbrance on land, shall also have the same right of action as the owner in fee in possession, to test the legality and validity of any other claim, lien or incumbrance on such land or any part thereof."

The land involved in the complaint is a quarter section in the city of Superior, Wisconsin, worth, according to the testimony of complainant's business manager, $160,000.00.

The bill of complaint, seeking to bring the case within the above quoted statute, alleges that the defendant claims the land in question through the "original owner" (a designation given in the Wisconsin statutes to the patentee of the United States government). But the bill further alleges that this "legal title," which was formerly in the government patentee, was divested from him and his grantee, and became vested absolutely in the complainant's grantor, by virtue of tax deeds, and by virtue of the Wis-

consin statutes of limitation curing defects in such deeds; and the bill prays that the defendant be perpetually enjoined from claiming such title derived from the original owner. Thus the following question is presented:

Are not suits by tax deed claimants against original owners, outside the spirit and reason of the above quoted statute, and are they not excluded therefrom, by the special statute of Wisconsin allowing, governing, and limiting this class of actions?

B.

The complainant does not rely upon the tax deeds as sufficient of themselves to give title. It claims, in its bill, in aid of both deeds, the general tax deed statute of limitations, and a special statute of limitations, chap. 133, of 1885, passed in aid of tax deeds that are void on their face.

Before the general statute of limitations can avail complainant, it must have a tax deed valid upon its face and duly recorded; the lands must have been within the jurisdiction of the taxing officers and the taxes not paid or redeemed.

Perhaps the special statute applicable to tax deeds void on their face will not be relied upon, as the proofs as to taxes, required by that statute, were not made.

C.

The complainant attempted to prove the tax proceedings for the years 1866 and 1876, upon which the tax deeds in question are based. In this attempt the complainant failed to prove valid proceedings. So this question is presented:

If a tax deed claimant relies upon a statute of limitations which estops his opponent from showing the truth,

may such party, himself, attempt to show the truth and, failing to sustain his deed in that way, fall back upon the estoppel?

D.

In Wisconsin the estoppel created by the running of the statute of limitations in favor of a tax deed is based upon the effect of the tax deed as evidence. The statute makes it presumptive evidence of certain things, and the statute of limitations having run it becomes conclusive evidence of the things of which it was before only presumptive evidence. In Wisconsin it is held upon constitutional grounds, that the law which governs the effect of a tax deed as evidence is the law that was in force at the time of the tax sale upon which the deed is based. This question is presented:

Do the complainant's tax deeds prove themselves, without common law proof of their execution? Defendant contends that they do not, under the laws in force at the dates of the tax sales.

E.

We will further contend for the following proposition:

1. That these tax deeds are void because the lands were not in the town of Superior where they were taxed.

2. That the tax deed of 1870 is void because the so-called records introduced by complainant of the tax of 1866, and delinquent return of 1867, are at least as good evidence that the tax of 1866, upon which said deed is based, was paid upon this land as that such tax was levied thereon; and that payment of the tax is also indicated by the tax certificates, and by the sales books.

3. That the tax deed of 1882 is void because it appears from the evidence that the tax of 1876, upon which it is based, was paid, by an executed agreement between complainant's grantor, Hayes, and the county board of supervisors, that a claim which he held against the county should be applied in payment of this and other taxes due from him.

4. That complainant proved, 1, that there was no assessment of property for taxation made in Superior in 1866; 2, that the deed in question was not executed by the officer whose official signature it purports to have; and, 3, that the lands were redeemed from the sales shown by the sales books for taxes of 1866, 1867, and 1868; and that complainant is estopped from denying the effect of its own evidence showing the deed of 1870 to be void.

F.

Other objections to the deeds will be mentioned later on. Some of these do not go to the extent of showing that they are not "tax deeds"; and these are urged upon the ground that complainant waived the statute of limitations by instituting the inquiry into the tax proceedings. Objections of both sorts, not already sufficiently indicated, will be referred to under head II of this abstract of the case.

G.

THE SUPPLEMENTAL COMPLAINT.

Pending this suit, the defendant herein brought ejectment in the state court for the lands in question against complainant and its tenant in possession, Thomas Darley.

The defendants in that action answered, setting up the same claim of title as in this suit. Thereafter, by a supplemental complaint, in the present suit, complainant set up the pendency of said ejectment action, and the pleadings therein made, and asked to have the plaintiff therein enjoined from prosecuting it. Thereon complainant obtained an *ex parte* order herein, requiring the ejectment plaintiff to show cause why his ejectment action should not be enjoined pending the present suit. An answer was filed to the supplemental complaint, and a replication to the answer, but the order to show cause was never heard, defendant herein consenting that the temporary restraining order embodied in the order to show cause might continue in force until he should move to set it aside. The issues in the supplemental proceedings were never brought to a hearing; (see printed record, pages 12 to 26.)

II.

THE TRIAL.

A.

In order to bring the tax deeds within the statutes of limitation relied upon by complainant, it became necessary for complainant to prove the levy of taxes upon the lands for certain years subsequent to the tax deed. To this end the complainant produced the county clerk as a witness, to prove the assessment and tax rolls, and delinquent returns, of which, by the Wisconsin statutes, the county

treasurer is the legal custodian. This testimony, as well as the competency of the witness was duly objected to; (printed record, pages 34 to 38.)

B.

Under the statutes of Wisconsin, and the decisions of the Supreme Court of the state, the recording of a deed is done by making certain prescribed entries in a book called the "General Index," the form of which book is prescribed by a mandatory statute. In the present case, there being a serious doubt whether the 1870 tax deed was entered in this index so as to be "recorded," the complainant offered proof that such entries were made in another book, claiming that such other book was made under authority of a special statute, and also claiming that such other book might be regarded as an original itself, if the real original was not sufficient. This testimony was duly objected to; (printed record, page 63, objection to complainant's exhibit 3. See stipulation at bottom of printed record page 76; also exhibit 3, page 167.)

C.

The complainant offered each of its tax deeds in evidence without attempting to prove them in any way. The defendant concedes that complainant might do this if the law in force at the time of the trial is the law which determines the effect of tax deeds as evidence. But, because the Supreme Court of Wisconsin has often and uniformly held that the law which governs the effect of a tax deed as evidence is the law that was in force at the time of the tax sale; and because that law did not make these tax deeds evidence of their own execution, as the present law does,

defendant contends that the tax deeds were not competent evidence without the usual proofs of execution. The deeds were objected to when offered: (printed record, page 29, objections to exhibits A and B.)

D.

Divers offers were made, by complainant, of exhibits in the nature of copies from indexes and records in the office of the register of deeds, all of which were duly objected to; (printed record, pages 29, 63, 76, &c.) These were so connected with each other, that the questions presented by them will be sufficiently indicated in this abstract of the case, without referring to them in detail.

E.

To rebut whatever effect the book might have which was offered by complainant, containing the entry shown by exhibit 3, referred to under head "B," *ante*, and to show that it was not the original "General Index," the defendant introduced the original and photographic copies therefrom, and of the page indorsed upon the original deed, exhibit A. The photographs were admitted to be correct; (printed record pages 63 and 64. Also defendant's exhibits A, B, and C, photographs, not in the printed record.)

F.

It was also claimed, by complainant, that the book from which its exhibit 3 was taken was an authorized copy of the original. To rebut this claim, defendant offered in evidence a copy of the entries made therein; (exhibit N, printed record, page 166), showing by comparison of it with the photograph of the original; (defendant's exhibit C), that it was not a copy of the original.

In copying the record for transmission to this court, the clerk of the circuit court seems to have attempted to copy the photograph, exhibit C; but of the many defects shown by the photograph only one appears in the printed record. (See page 176). The tabular exhibit on page 176 is an attempted copy of defendant's exhibit C, although not so named in the printed record. The one defect thereon appearing is the description "Southeast *half.*"

G.

The complainant proved that upon January 14th, 1869, the county clerk of Douglas county appointed Thompson Ritchie as deputy county clerk. (Complainant's exhibit 7, page 83). The deed of 1870 bears date September 5th, 1870, and is signed by "D. C. Relf, Deputy." To explain the signing of it by D. C. Relf instead of Ritchie, complainant proved that the county clerk removed Ritchie and appointed D. C. Relf in his stead; (complainant's exhibit 8, page 84). Defendant claims that in Wisconsin the deputy county clerk is an independent officer, and cannot be removed by the county clerk. The testimony offered to show Ritchie's removal was duly objected to; (printed record, page 76, objections to exhibit 8.)

H.

The tax warrant of 1886, upon which the deed of 1870 is based, is signed "James S. Ritchie, pro tem clerk of said town." exhibit M, page 92, of printed record, is an admission, on the part of complainant, that at the time when this tax warrant was signed A. A. Hood was the town clerk, and that James S. Ritchie signed it in his own

name "in order to relieve the said Hood and to assist him;" also that the entire tax roll was made by said Ritchie and not by the town clerk.

I.

The defendant offered in evidence duly certified copies of the original tax certificates, upon which the two original tax deeds purport to be based; (defendant's exhibits F and G, pages 78 and 79 of printed record, and notes at bottom of page 78.) The certificates do not contain the lands in question, nor show an assignment to Hayes, the tax deed grantee.

J.

It was a question which of the two documents, entries from which appear as numbers 9 and 11 of complainant's exhibit 4 (pages 179 and 180 of printed record,) was the delinquent return of the tax of 1866. One of these documents says the tax was "paid by H. Hayes July 29;" the other contains a ditto mark opposite the entry of the land in question, and above the ditto mark, as appears from the evidence, are the words "paid July 22 E. W. A." The ditto mark in question is precisely the same character used as a ditto mark throughout the book; it is copied in the right hand column of exhibit 4—9 at bottom of page 179 printed record. The complainant produced a witness who testified, under objection (pages 74 and 75 of printed record,) that the marks in question were made before the tax sale, but that in this particular instance the ditto marks were not intended as such, but had a special meaning, as a private hieroglyphic used by the person who made the book, for his own private information, and not for the information

of the public who might examine the record. The defendant takes the ground that the record cannot be contradicted by parol evidence. The Wisconsin statutes of limitation do not run in favor of a tax deed if the tax upon which the deed is based has been paid, or the lands redeemed therefrom before the deed issued.

K.

The tax proceedings in question purport to have been carried on by the officers of the town of ~~Douglas~~ Superior, but the defendant proved that in 1859 the town of Pokegema was organized by the county board, and included the entire government township, number forty-nine (49) north, range fourteen (14) west, in which the lands in question are situated; (defendant's exhibit I, page 80 of printed record.) Defendant also proved that the town of Pokegema was duly organized, and represented upon the county board in 1859 and 1860; (printed record page 71.) As this created a presumption that the lands in question were not in the town of ~~Douglas~~ Superior in 1866, when the tax in question was levied, complainant, to rebut that presumption, offered exhibit 5 (page 83 of printed record) which contains an order vacating the town of Pokegema, but making no disposition of its territory or its inhabitants. Complainant claims that thereafter the officers of Superior exercised *de facto* jurisdiction over the vacated territory, from 1861 until after the levy of the tax in question. Complainant claims that this exercise of jurisdiction appears from its exhibit No. 6 (pages 96 to 163 of printed record) which is a copy of the minutes of the town board of Superior during that time. These offers of complainant's exhibits 5 and 6 were duly objected to (printed record page 76.)

Thus the question is presented whether the case is not the same in principle as that of Smith vs. Sherry, 54 Wis., 114, which decides that where the lands are not within the jurisdiction of the taxing officers "the tax sale and deed are mere nullities," to which the statute of limitations do not apply.

L.

It was also shown that the proofs of publication of notices of sale, and the records in the sales books and other books, are void and ineffectual, under the Wisconsin statutes and decisions. These matters are of such a nature that they can be particularly set forth only in connection with the presentation of the legal points involved in them.

III.

WISCONSIN STATUTES APPLICABLE TO SOME OF THE QUESTIONS INVOLVED.

Several of these statutes can be sufficiently shown by brief quotations from them in presenting the points to which they apply. Such as require a more lengthy statement are here set forth.

A.

STATUTES PRESCRIBING THE FORM OF TAX DEEDS AND THEIR EFFECT AS EVIDENCE, AND SHOWING THAT SUCH DEEDS WERE NOT EVIDENCE OF THEIR OWN EXECUTION, IN WISCONSIN, UNTIL 1878.

a. Sec. 109, Chap. 15, R. S. 1849, "If any land sold for taxes shall not be redeemed as aforesaid, the clerk of the board of supervisors of the county where the same was sold, shall, after the expiration of the time prescribed by law for the redemption thereof, on the presentation to him of the certificate of sale, execute in the name of his county as clerk of the board of supervisors thereof, under his hand and seal, to the purchaser, his heirs, or assigns, a deed of the land so remaining unredeemed, and shall acknowledge the same, which shall vest in the grantee an absolute estate in fee simple in such land, subject, however, to all unpaid taxes and charges, which are a lien thereon, and to redemption, as provided in this chapter; and such deed duly witnessed and acknowledged, shall be prima facie evidence of the regularity of all the proceedings, from the valuation of the land by the assessor inclusive, up to the execution of the deed, and may be recorded with the like effect as other conveyances of land."

b. Sec. 127, Chap. 18, R. S. 1858, prescribed a form for tax deeds; but as the form in use from 1859 to the present time is prescribed by section 50, chapter 22, G. L. 1859, it is here given, as an amendment of the R. S. 1858.

"To all to whom these presents shall come, greeting:

Whereas, ———— (or assignee of ————) has deposited in the office of the clerk of the county board of supervisors, of the county of ——— in the state of Wisconsin, a certificate (or certificates) of the (here name the officer making the sale) of said county, whereby it appears (as the fact is) that the following described piece (or pieces) or parcel (or parcels) of land, lying and being situated in the county of ———, to-wit: (Here describe the lands) was (or were) for the nonpayment of taxes, sold by the (here name the officer making the sale) at public auction, at ———, in the county of ———, on the ——— day of ———, in the year of our Lord one thousand eight hundred and ———, to the said ————, for the sum of ——— dollars and ——— cents in the whole; which sum was the amount of taxes assessed, and due, and unpaid on said tract (or several tracts) of land, together with the cost and charges of such sale, due therewith at the time of making such sale, the whole of which sum of money has been paid by the aforesaid purchaser, (or purchasers) and whereas it further appears (as the fact is) that the owner (or owners) or claimant (or claimants) of said lands, has (or have) not redeemed from said sale the lands

different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited, can only be taken by answer.

Section 14. The periods prescribed in section 1 of this chapter for the commencement of actions other than for the recovery of real property, shall be as follows :—

Section 15. Within twenty years :—

1. An action upon a judgment or decree of any court of record of this state.

2. An action upon a sealed instrument, when the cause of action accrues within this state.

Section 16. Within ten years :—

1. An action upon a judgment or decree of any court of record of any state or territory within the United States, or of any court of the United States.

2. An action upon a sealed instrument when the cause of action accrued without this state.

Section 17. Within six years :—

1. An action upon a contract, obligation, or liability, express or implied, excepting those mentioned in sections fifteen and sixteen of this chapter.

2. An action upon a liability created by statute, other than a penalty or forfeiture.

3. An action for a trespass upon real property.

4. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.

5. An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated.

6. An action for relief on the ground of fraud, in cases which were heretofore solely cognizable by the court of chancery.

Section 18. Within three years :—

(This section refers wholly to actions against sheriffs, coroners, and constables for nonfeasance and unfeasance excepting for escapes.)

Section 19. Within two years :—

1. An action upon a statute for a penalty or forfeiture.

2. An action for libel, slander, assault, battery, or false imprisonment.

Section 20. Within one year :—

1. An action against a sheriff, or other officer, for the escape of a prisoner, arrested or imprisoned on civil process."

C.

STATUTES SHOWING THAT THE COUNTY TREASURER'S OFFICE IS THE PROPER REPOSITORY OF THE ASSESSMENT AND TAX ROLL AND TOWN TREASURER'S RETURN OF DELINQUENT TAXES.

Sections 59 and 61 of Chap. 18, R. S. 1858, are as follows:

"Section 59. It shall be the duty of every town clerk, immediately upon the reception of the corrected assessment roll, and a certificate of the amount of state, county, and school tax apportioned to his town as aforesaid, to calculate and carry out the total amount of such taxes, together with all town and other local taxes unless otherwise provided, adding thereto five per cent. for expense of collection, in an additional column prepared for that purpose in the assessment roll, setting opposite to the several sums set down as the valuation of real and personal estate the respective sums assessed as taxes thereon, in dollars and cents, rejecting the fractions of a cent."

"Section 61. To each assessment roll so delivered, a warrant under the hand of the town clerk shall be annexed, substantially in the following form, to wit:—

"The State of Wisconsin to ————, town treasurer of the town of ———, in the county of ———. You are hereby commanded to collect from each of the persons and corporations, named in annexed assessment roll, and of the owners of the real estate described therein, the taxes set down in such roll opposite to their respective names, and to the several parcels of land therein described; and in case any person or corporation, upon whom any such sum or tax is imposed, shall refuse or neglect to pay the same, you are to levy and collect the same by distress and sale of the goods and chattels of the person or corporation so taxed; and out of the moneys so to be collected, after deducting your fees, you are first to pay to the treasurer of said county, on or before the last Monday of January next, the sum of ———, for state taxes; you are to retain and pay out, as town treasurer, according to law, the sum of ———; and the balance of said moneys you are required to pay to said treasurer for county purposes, on or before the day above specified; by which day you are further required to make return to said treasurer of this warrant, with said roll annexed, together with your doings thereon, as provided by law.

Given under my hand, this ——— day of ————, in the year 18——.

———————

Clerk of said town."

Sec. 92, Chap. 18 R. S. 1858. This section is lengthy and need not be quoted, as it merely provides that the town treasurer shall make a return to the county treasurer of the unpaid taxes, and prescribes the form of the return. It adds nothing to the command of the warrant prescribed by section 61 that the town treasurer shall return the assessment and tax roll and tax warrant to the county treasurer, "together with his doings thereon," except that it provides particularly how "his doings thereon," shall be returned.

Prior to the revision of 1878 there was no statute providing what the county treasurer shall do with these books, except that he shall "deliver over to his successor * * * * all moneys, books, papers, and other things appertaining or belonging to his office." Sec. 123, Chap. 18, R. S. 1858.

D.

STATUTES AS TO RECORDING DEEDS.

Secs. 140, 142 and 143 of Chap. 13, R. S. 1858, are as follows:

"Sec. 140. The register of deeds shall have the custody of, and shall safely keep and preserve, all the books, records, deeds, maps, and papers deposited or kept in his office; he shall also record or cause to be recorded correctly, and in a plain and distinct handwriting in suitable books, to be provided and kept in his office, all deeds, mortgages, maps, instruments, and writings authorized by law to be recorded in his office, and left with him for that purpose, and shall perform all other duties required of him by law."

Sec. 142. "Every register of deeds SHALL keep a general index; each page of which SHALL be divided into eight columns, with heads to the respective columns as follows, to-wit:—

Time of reception.	Name of grantor.	Name of grantee.	Description of land.	Name of instrument	Volume and page where recorded.	To whom delivered.	Fees received.

Sec. 143. "Such register shall make correct entries in said index of every instrument or writing received by him for record, under the respective and appropriate heads, entering the names of the grantors in alphabetical order; and he shall, immediately upon the receipt of any such instrument or writing for record, enter in the appropriate column, and in the order of time in which it was received, the day, hour, and minute of reception, and the same shall be considered as recorded at the time so noted."

IV.

ERRORS RELIED UPON.

Appellant alleges that the court erred in the following particulars, each of which is hereby assigned as error, to-wit:

1. In not dismissing the bill for want of equity and because barred by the statutes of limitation.

2. In not deciding that the suit was barred by the statutes of limitation relied upon in the answer.

3. In not deciding; that the alleged tax deed of 1882 was inadmissible as evidence without proof; that the tax upon which it purports to be based was redeemed before the issue of the deed; that it was not recorded; that the statutes of limitation had run against it; and in not sustain-

ing defendant's various objections thereto, and in not deciding any of the issues relative to said deed, and in not deciding that said deed is a nullity.

4. In deciding that complainant is the owner of the lands in suit.

5. In receiving the tax deed of 1870 in evidence without proof of its execution.

6. In receiving the evidence of the witness I. W. Gates, to contradict the record.

7. In not deciding that both tax deeds are void for defects in the tax proceedings, which defects were affirmatively shown by the complainant.

8. In deciding that the tax deed of 1870 was valid upon its face, and in not deciding that it was void upon its face.

9. In not deciding that the tax deed of 1870 was a nullity for reasons not appearing on its face, but shown by the evidence.

10. In deciding that the tax deed of 1870 was properly and legally recorded.

11. In deciding that the lands in question were within the jurisdiction of the taxing officers of the town of Superior, in 1866.

12. In deciding that the tax of 1866 was not paid.

13. In receiving and considering the testimony and exhibits objected to by the defendant.

14. In deciding that a claim of title was made by defendant under and by virtue of the deed from James D. Ray to James Bardon, dated March 6th, 1878.

15. In perpetually enjoining the defendant from prosecuting his ejectment suit in the State Court.

16. In perpetually enjoining the defendant and persons claiming under him since the commencement of this suit from setting up any claim to the lands in suit.

17. In decreeing that the defendant release to the complainant his claim of title.

18. In giving the complainant judgment.

V.

POINTS.

A.

THE BILL SHOULD HAVE BEEN DISMISSED FOR WANT OF EQUITY, AND BECAUSE THE REMEDY IS BARRED BY STATUTE.

1. It can not be maintained as a bill to remove a cloud upon title.

Page vs. Kennan et al., 38 Wis., 320.
Nickerson vs. Loud, 115 Mass., 94.
Ward vs. Dewey, 16 N. Y., 519.
Allen vs. City of Buffalo, 39 N. Y., 386.
Schroeder vs. Gurney, 73 N. Y., 430.
Moore vs. Cord, 14 Wis., 231.
Truesdell vs. Rhodes, 26 Wis., 215.
Bockes vs. Lansing, 74 N. Y., 437.
Maisch vs. Hoffman, 42 N. J. Eq., 116.
Rhea vs. Longstreet, 54 Ala., 291.

2. The bill cannot be maintained under Sec. 3186, R. S. quoted *ante*, page 2, because it is obviously not within the reason and spirit of that statute; and because the action is specially provided for, governed and limited by section 35 of chap. 22 G. L. 1859, which is still in force as Sec. 1197, R. S., 1878, and is set out in full *ante* page 15.

"Former owner," referred to in that law, means the person owning the land at the time of the sale:

Lybrand vs. Haney, 31 Wis., 230.

Assigns. The grantee of the grantee in a tax deed may bring the action:

Finney vs. Ford, 22 Wis., 167.

The action here provided for is equitable in its nature:

Dayton vs. Pelt, 34 Wis., 86.

And is in the nature of *a suit to quiet title.* "It is founded upon the assumption that the title is divested by the tax proceedings."

Warner vs. Trow, 36 Wis., 195.

To say that the suit barred in three years by the statute above cited is a suit to *bar* the former owner from claiming title, and that the present suit is not a suit to *bar* him from claiming title, but to *enjoin* him from claiming title is an obvious subterfuge invented to evade the plain purpose of the statute; in as much as the statute under which complainant claims to have brought its bill provides that the complaint *shall* contain a prayer that the defendant "*be forever barred against having or claiming any right or title to the land adverse to the plaintiff.*" And the cunning of complainant's counsel in omitting this prayer,

which that statute commanded them to insert in their bill, will not avail them in their effort to blow hot and cold at the same time.

3. Complainant's suit is barred by Sec. 35, Chap. 22, G. L. 1859, quoted ante, p. 15.

The action authorized by that law could only be brought within three years after the date of the tax deed. The deeds in question here were issued seven and nineteen years, respectively, before the present action was commenced.

The action authorized by that law was an action to *bar* the original owner, or those claiming under him. The present suit is brought, confessedly, as the bill shows, against those claiming under the original owner, and its avowed purpose is, as we have seen, substantially the same as the one barred by the law of 1859.

The complainant claims that the present action is brought under Sec. 3186, Wis. R. S. of 1878, quoted *ante* page 2.

The remedy there provided is given to two classes of persons, viz.: owners of the legal title and lien holders. So also the remedy given by the law of 1859 lies either, before record of the tax deed, when the tax claimant is a mere lien holder, or after such record, when he holds the legal title. But the latter law applies solely to tax titles; and this special statute excludes complainant from the general statute, Sec. 3186, (see cases cited post, page 28.)

In Wisconsin when an existing remedy is barred under the tax limitation laws, the title in behalf of which such remedy was given is also lost; and it is beyond the consti-

tutional power of the legislature to give a new remedy after the lapse of the old one.

Sprecher vs. Wakely, 11 Wis., 451.
Hill vs. Kricke, Id., 465.
Knox vs. Cleveland, 13 Wis., 274.
Parish vs. Eager, 15 Wis., 590.
Smith vs. Cleveland, 17 Wis., 556.
Pleasants vs. Rohrer, Id., 577.
Lindsay vs. Fay, 28 Wis., 177.
Cutler vs. Hurlbut, 29 Wis., 152.

It is also well settled in Wisconsin, that rights once lost by such loss of remedy, under the statutes of limitation, can not afterwards be asserted in a different sort of action as to which a different limitation exists.

Mead vs. Nelson, 52 Wis., 402.
Manseau vs. Edwards, 53 Wis., 457.
Clarke vs. Lincoln Co., 54 Wis., 578.
Dalrymple vs. Milwaukee, 53 Wis., 178.
Wis. Cent. R. Co., vs. Lincoln Co., 57 Wis., 137, 147.
Ward vs. Walters, 63 Wis., 39, 45.

B.

Complainant's suit is also barred by sec. 22, chap. 138. R. S. 1858. That section reads as follows:

"An action for relief not hereinbefore provided for, must be commenced within ten years after the cause of action shall have accrued."

It will be seen from an examination of the sections, 14 to 21 of said chapter 138, hereinbefore set forth, *ante* pages 15, 16, that there is no other limitation therein provided upon an action for the relief claimed in the present suit.

The only question is whether the cause of action accrued more than ten years before this suit was brought.

The causes of action alleged in the bill are certain adverse claims of title, one of which was a deed made January 4th, 1877, by James Bardon and wife to the defendant herein; and the other of which was a deed made May 21st., 1863, by Thomas A. Kiley to the defendant. No attempt was made to prove that either of these deeds were made or delivered. The deed from James Bardon and wife to the defendant is admitted by the answer, and is the only claim of title in question here. That claim of title was made, as alleged in the bill and admitted in the answer, January 4th., 1877. The cause of action accrued on that day, and this action was commenced more than twelve years thereafter. The limitation was ten years, as we have seen.

As already said, complainant claims that the present suit is brought under Sec. 3186 R. S., quoted *ante*, page 2. That section was section 29 of Chap. 141 R. S. 1858, and has been in force in Wisconsin ever since. But the question of the application of the ten year limitation to that remedy has not been before the Wisconsin Supreme Court.

It has been applied to other equitable actions, both by this court and the Wisconsin Court.

Ins. Co. vs. Reed, 24 How. U. S., 284.
Fullerton vs. Spring, 3 Wis., 667.
Parker vs. Kane, 4 Wis., 1.

Its application to the remedy given by Sec. 3186 is obvious.

C.

DID COMPLAINANT'S TAX DEEDS PROVE THEMSELVES?

This question has never been before the Supreme Court of Wisconsin.

In Wisconsin, *upon constitutional grounds*, a tax deed is allowed no other effect as evidence than that given by law in force at the time of the tax sale upon which the deed is based.

Nelson vs. Roundtree, 23 Wis., 367.
Woodman vs. Clapp, 21 Wis., 350.
Knight vs. Barnes, 25 Wis., 352.
Lindsay vs. Fay, 29 Wis., 177.
Lain vs. Sheperdson, 18 Wis., 59.

The question therefore is what effect was given to tax deeds, as evidence, by the Wisconsin statutes in force at the tax sales of 1867 and 1877,—the two sales upon which complainant relies?

Under the head of "Statutes" *ante*, pages 13, 14, the several laws prescribing the effect of tax deeds as evidence from 1849 to 1878 are given.

It will be there seen that the R. S. of 1849 made a tax deed "when executed witnessed and acknowledged" "*prima facie* evidence of the regularity of all proceedings from the valuation of the land by the assessor, inclusive, up to the execution of the deed."

Next came the session law of 1852, which made a tax deed conclusive evidence of the regularity of all proceedings. This was repealed by the R. S. of 1858, and needs no further mention. The next law on the subject was

section 127, Chap. 18, R. S. of 1858, which as will be seen, is the same as the statute of 1849, with an amendment which made the tax deed evidence only when recorded.

This was changed and the law of 1849 fully restored by chapter 22, G. L. of 1859, section 25, which remained in force at the time of the two tax sales in question, and thereafter until the revision of 1878, when it was amended so as to make the deed evidence of its own execution. The following is the law of 1859, as amended by the revision of 1878, the amendment being shown by the words in brackets :

"And such deed, duly witnessed and acknowledged, shall be presumptive evidence of the regularity of all the proceedings from the valuation of the land by the assessor up to (AND INCLUDING) the execution of the deed."

Without the added words "and including," found for the first time in the revision of 1878, a tax deed would not be evidence of its own execution, and would be subject to the common rule, requiring proof.

It will be seen from examining the statutes of 1849, 1858 and 1859, *ante* pages 13, 14, that in all three of them the tax proceedings of which the deed shall be presumptive evidence is stated to be the proceedings "from the valuation of the land by the assessor, inclusive, up to the execution of the deed." This language indicates a careful use of such words as should include the assessment in the evidential effect of the deed, and exclude the execution of the tax deed therefrom. This language was changed in 1878, as we have seen, so that the effect of the deed as presumptive evidence should cover the tax proceedings "from the valuation of the land by the assessor inclusive up to *and including* the execution of the deed," and the same

amendment is inserted *in two places* in the revision of 1878. We could have no clearer demonstration of the legislative intent, and of the sense in which it used the language found in the statutes of 1849, 1858 and 1859, and the amended expression found in Sec. 1176 R. S. 1878.

A subsequent act on the same subject affords complete demonstration of the legislative sense of its own language.

Alexander vs. Mayor, 5 Cranch, 1.

This rule is well established, and has received the sanction of the Wisconsin Supreme Court.

Munger vs. Lenroot, 32 Wis., 541.

Supervisors vs. Ehlers, 45 Wis., 281.

It is held in Wisconsin that a general statute, section 4129, giving effect to instruments as evidence without proof of signature, does not apply to conveyances of land.

Hinchlift vs. Hinman, 18 Wis., 130.

For an additional reason that statute, or any other general statute would not apply to tax deeds, namely, because they have always been governed by special statutes which provide that they shall be witnessed and acknowledged as other deeds, but which, until 1878, *excluded* from their evidential effect, when so witnessed and acknowledged, any power to prove themselves.

It is held in Wisconsin that a special statute, in cases where it applies, excludes the general statute.

Smith vs. Todd, 55 Wis., 459.

Hancock vs. Merriam, 46 Wis., 159.

Felt vs. Felt, 19 Wis., 193.

Mead vs. Bagnall, 15 Wis., 171.

The point is that, there being a special statute prescribing the effect of tax deeds as evidence, and which, at the

time of these tax sales, excluded from such effect the fact of their own execution, the execution of the tax deeds must be proved. The tax deeds not being evidence of their own execution are, of course, evidence of nothing else until proved. When proved they have the *prima facie* effect given by the law in force at the time of the tax sales. The burden of proof was upon complainant to show a case to which the statute of limitations could apply, and this could only be done by offering the tax deeds in evidence after proving them so as to make them admissible.

Besides the ordinary proofs of execution, required under the common law, there are, in Wisconsin, certain special statutory requirements as to the execution of tax deeds, viz:

a. Sec. 2, Chap. 460, G. L. 1864, re-enacted as a part of Sec. 1176, R. S. 1878, is as follows:

"The clerk of the board of supervisors shall not issue a deed of any parcel of land until by carefully comparing the advertised sale list of lands for unpaid taxes and the advertised list of the same for redemption, with the treasurer's list of said lands in his book of sales, he shall find that the description of such parcel of land so to be conveyed has been correctly and fully published, both in such advertised list of sales and redemption; and if upon such examination, the clerk of the board of supervisors shall find any error or omission in any such advertised description, he shall enter opposite the description of said land in his book of sales, a statement of the fact of such error or omission; and it is hereby made the duty of the county board, in all such cases, to cause such certificate of sale of land so erroneously advertised, to be canceled, and to direct the county treasurer to correct the description thereof, and readvertise and sell the same at the next ensuing sale, according to law, for unpaid taxes."

b. Sec. 1, Chap. 113 G. L. 1867, as amended by chapter 157 G. L. 1858, and continued as Sec. 1175 R. S. 1878 is as follows:

"Whenever any lot or tract of land which has been or shall hereafter be sold for taxes, shall have been in the actual occupancy or possession of any person for the period of thirty days or more at any time within the six months immediately preceding the expiration of the time of

whose real estate is directed to be sold by virtue of the order of the court under which the sale and deed purport to have been made, in the lands and real estate described in such deeds, passed to and vested in the grantee or grantees in such deeds."

And the decision of the Wisconsin court upon the point involved is as follows, quoting from the case last cited:

"Had the plaintiff introduced in evidence the sheriff's deed and rested his case upon it, he would doubtless have proved thereby, prima facie, that he had acquired the interest of the judgment debtor in the land in controversy. Laws of 1869, ch. 40 (Tay. Stats., 1610, Sec. 123). He did not choose, however, to rely upon his deed, but attempted to prove the regularity of the proceedings preliminary thereto. By taking upon himself the burden of showing such proceedings regular, and that his deed conveyed to him the title of the judgment debtor, he relieved the defendant from the burden of showing the contrary. For it must be presumed that the plaintiff has made the best case he can for himself, and has proved all the preliminary proceedings which he deems material to his case. Hence, if the evidence offered by the plaintiff failed to show that all material steps in the proceedings preliminary to the deed were taken, or that some of them were materially irregular, or, all the proceedings being regular, if they did not authorize the sheriff to convey the land to the plaintiff, the nonsuit was proper. A kindred rule has been applied by this court to averments in pleadings. Teetshorn v. Hull, 30 Wis., 162; Kellam v. Toms, 38 id., 592. The principle seems to be, that when a statute creates a presumption of facts in favor of a party, on proof of certain other facts, and such party, instead of availing himself of the benefit thereof, attempts to prove the presumed facts, he must prove facts sufficient to constitute a cause of action, unaided by the statutory presumption."

The principle underlying this decision of the Wisconsin Supreme Court is found in and declared by all the authorities in which the rule of waiver by election is enforced. These decisions are too numerous, and the rule maintained by them too familiar to warrant any extended reference to them. We will merely cite a few of them in which it was held that constitutional or statutory rights were waived.

a. Waiver of constitutional rights:

Ferguson vs. Landram, 96 Am. Dec., 350, and note.

Cooley's Const. Lim., 4 Ed., 219.

Darge vs. Company, 22 Wis., 398.

b. That the statute of limitations and its benefits may be waived:

Allen vs. Smith, 129 U. S. 465.
Smith vs. Lincoln, 54 Vt., 382.
Kennedy vs. Powell, 7 Pa. Rep., 606.
Heath vs. Heath, 31 Wis., 223.

The printed record affords a good demonstration of how unjust it would be to permit complainant to go into proof as to these tax proceedings while denying defendant the same privilege. For example: complainant, by the testimony of the county clerk (page 34) that the assessment roll was not in his office, and by the joint certificate of that officer and the county treasurer to exhibit 46 (page 189) that it was in *one* of their offices, created a necessary inference that it was in the right office, to-wit: the office of the county treasurer. We proved by the county treasurer (page 69) that it was not in his office. If we are precluded from proving that fact the false inference created by complainant's testimony must stand.

But the rule for which we are contending goes farther than merely to permit us to inquire with reference to the particular tax proceedings concerning which the complainant has introduced testimony; for it is a principle of the doctrine of election, that an election as to part will be held to include the whole of the subject matter or right involved. Under this rule a waiver of the statute of limitations as to any particular tax proceeding which it was designed to cure waives it in *toto*. Many illustrations of this feature of the rule are found in the reported cases. We cite a few only:

Knapp vs. Runals, 37 Wis., 135.
Weed vs. Page, 7 Wis., 428.
Moore vs. Barre, 11 Iowa, 198.
Kellogg vs. Turpie, 93 Ill., 265.

And the rule goes still farther, as shown by the following language of the Wisconsin court in *Claflin vs. Robinhorst, supra.*

"The plaintiff, having rejected the benefit of the statutory presumption in favor of his deed, was, under the above rule, bound to show: 1. A valid judgment and execution; 2. Some proceedings under the execution during its life, looking to a sale of the land, as, for example, a levy, or publication of notice of sale (Wood vs. Colvin, 5 Hill, 231;) 3. The sale on due notice; and 4. The due assignment to the plaintiff of the interest of all his co-purchasers."

The complainant failed to comply with this rule of the state court. It merely offered entries from the assessment and tax roll, delinquent return, and sales book. It offered no proof of the tax certificate, nor of the notice of sale, nor any proof that the books containing the entries shown by exhibit 6 were signed, certified or made in due form, as required by the state law.

But, on the other hand, the defendant who, under the rule of the Wisconsin court in the Claflin case might have rested upon the complainant's failure of proof, took the initiative and showed the following defects in the tax deed of 1870:—

1. Tax records not in the proper office. (Q. and Ans. 58, 59, 60 page 69.) This fact raises a presumption that the records do not exist.

Hall vs. Kellogg, 16 Mich., 135.
Jarvis vs. Silliman, 21 Wis., 599.
Hiles vs. Cate, 75 Wis., 91, and cases cited.

The statutes cited *ante*, pages 17, 18, requiring the assessment and tax roll, and delinquent return to be delivered by the town clerk to the county treasurer, impliedly impose upon the latter officer the duty of keeping these records, although this is not expressly mentioned except as it may be inferred from the duty imposed upon him to deliver all books and papers of his office to his successor. There is no statute permitting him to entrust the safe keeping of his books to any other officer. The case comes fairly within the authorities above cited. But apart from the presumption of the non-existence of the records, arising, under these authorities, from their not being found in the proper office, the fact of their not being kept there is an irregularity which would make the deeds void, even if evidence to show their existence in some other custody were competent. This would be so, for the reason that the person whose property is taxed is entitled to notice of the tax proceedings, and can not be supposed to have such notice unless the records which contain the proceedings are kept in the legal custody, where he would naturally go if he desired to look at them.

2. Proofs of publication of notice of tax sale void. (See affidavit of posting notice of sale, question and answer 66, testimony of county treasurer, pages 69 and 70 of record.)

Hilgers vs. Quinney, 51 Wis., 62.

Ward vs. Walters, 63 Wis., 39 and cases cited upon page 43.

3. Tax warrant not signed by the town clerk.

R. S. of Wis., 1858, Chap. 18, Sec. 61, ante page 17.

4. Lands not described in certificate of tax sale. Upon this point the Supreme Court of Wisconsin says :—

"The certificate is the *sole* evidence of the land sold, and the deed of that conveyed."

Curtis vs. Supervisors, 22 Wis., 161.

The description of this land appears *erased* from the original certificates. This is evidence that the lands were not sold. Here is an erasure of the very description—a *deliberate* act evidencing a *negative* of what would appear if the erasure had not been made. It is stronger evidence of no sale than it would be if the entry had not been made at all, because that might be an accidental omission : (see record page 78, 79, and see notes at bottom of page 78, exhibits F. and G.)

5. Certificates *not assigned* to the grantee in the tax deed. The Supreme Court of Wisconsin holds that this makes the deed void.

Smith vs. Todd, 55 Wis., 459.

Eaton vs. Supervisors, 44 Wis., 489.

Horn vs. Garry, 49 Wis., 464.

In the latter case the statutes are quoted showing how an assignment of a tax certificate by the county treasurer must be made, and the court held that the law had not been complied with, and said "There can be no question that this tax deed, so issued and executed, in violation of law, is absolutely void."

Many other defects in the tax proceedings were shown, but a hundred others would not help us if any one of the five above mentioned is not sufficient to avoid tax deeds, when

the complainant took the burden of proving a valid tax proceeding and in the language of the Wisconsin court before quoted "rejected the statutory presumption in favor of his deed."

All five of said objections apply to the deed of 1870. Objections 1, 4 and 5 apply to the deed of 1882.

The question presented under this head is not whether complainant has abandoned one source or claim of title by asserting an inconsistent one, or one differently derived. We would not and do not contend for any such proposition. The question is merely whether the complainant has not consented to an inquiry into the validity of the one and only source of title which it asserts.

E.

THE COMPLAINANT IS ESTOPPED BY ITS OWN PROOFS AND ADMISSIONS SHOWING THE INVALIDITY OF THE TAX DEED OF 1870.

The complainant not only opened the door for inquiry into the validity of the tax deeds, but went farther and introduced affirmative proofs of the invalidity of the tax deed of 1870, as follows:

a. In complainant's exhibit 6, upon page 163 of the printed record, is the following record from the office of the town clerk of Superior referring to the assessment roll of 1866, viz:

"The valuation of said Douglas county being $295,803.44, as added up by *the clerk who made out the assessment roll.*"

By introducing this portion of the town records the complainant proved that there was not *even in the town of Superior* an assessment of the lands in question for the year 1866, because it shows that the assessment roll was made by "the clerk." Whether the town clerk is meant by this or not we are left to guess; but that does not matter. An assessment, which is the very foundation of taxation, and which is, in Wisconsin, *the only judicial act performed, or required by law in the entire course of the tax proceedings*, is of course a mere nullity if not done by the assessor. The fact thus proved by the complainant is also corroborated by the admission (see Exhibit M page 92 of printed record) that the tax roll (which, as we have seen, is the assessment roll with the taxes carried out upon it and tax warrant attached) was in the handwriting of Jas. S. Ritchie, who claimed to act as "*pro tem clerk* of said town" an office unknown in the state; but let that pass for the present. Suffice it to say he was not the assessor and did not claim to act as such.

In Wisconsin, assessment of property is a constitutional pre-requisite to taxation, and our Supreme Court holds that "no statute can dispense with assessment."

Marsh vs. Supervisors, 42 Wis., 502.

If the assessment cannot be dispensed with, neither can the assessor, for by this officer alone can it be made.

b. The tax deed of 1870 is executed by D. C. Relf, as deputy clerk of the county board of supervisors. The deputy clerk is not an agent of the clerk of the board, but is an independent officer, deriving his powers directly from the statute.

Gilkey vs. Cook, 60 Wis., 133.

R. S. 1858, Chap. 13, Sec. 55, is as follows:

"Every such clerk shall appoint a deputy, in writing under his hand, and shall file such appointment in his office; and such deputy, in case of the absence or disability of such clerk, OR IN CASE OF A VACANCY IN HIS OFFICE, shall perform all the duties of such clerk during such absence, or until such vacancy shall be filled; and every such clerk and his sureties shall be responsible, under his official bond, for the acts of his deputy."

Although the statute gives the clerk the power to appoint the deputy, it gives him no power to remove the deputy.

In the present case the complainant proved by its exhibit 7, (printed record, pages 83-84) that Thompson Ritchie was appointed deputy upon the 4th of January, 1869.

Thus the complainant, by its own proof, created the presumption that Thompson Ritchie held the office of deputy during the term of the clerk.

Best on evidence, Sec. 405.
I. Greenleaf evidence, Sec. 41.
Johnson vs. Wilson, 2 N. H., 202.

The complainant attempted to immediately contradict the presumption arising from its own exhibit 7, by introducing exhibit 8 (printed record page 84) showing that Richie's appointment was revoked by the clerk on the 12th of June, 1869, and that D. C. Relf was appointed deputy on that day. Due objection was made to this testimony (printed record 76) and we insist that even if the complainant should be permitted to contradict its own testimony, exhibit 8 is not sufficient for that purpose, because the county clerk had no power to revoke the appointment of Ritchie, and his appointment of Relf, as deputy, failed, there being no vacancy to fill.

Collins vs. Tracy, 36 Texas, 546.
Com. vs. Sutherland, 3 Serg. and R. 145.
Brown vs. Grover 6 Bush. 1.

And it was not shown that D. C. Relf ever did an official act except to sign this one tax deed, or that there was any public acquiesence in his claim to the office, nor that Ritchie did not continue to act as deputy.

c. Number 10 of complainant's exhibit 4 (the first entry upon page 180 of printed record) is entitled "Tax sale of Douglas County September 3d 1867." This would naturally be expected to contain the sale of the lands in question if there had been one for the tax of 1866, and it is the proof offered by complainant, and the only proof offered by it to show such sale. In the column showing "To whom sold" nothing whatever appears except that the lands in question was sold to Hiram Hayes for the taxes of 1867 $12.60, and for the taxes of 1868 $20.77. In the column headed "By whom redeemed" it is stated that redemption was made by Geo. Bosworth. This statement is unqualified in any way whatever. It is clear proof of redemption from whatever sales are mentioned in, or can be inferred from the book.

R. S. 1878 Sec. 4162, in force since 1849, is as follows:

"All entries and records, made in the books in the office of any county treasurer, or of any county clerk, all assessments and tax rolls, and certificates and warrants thereto attached, all notices required to be published, or posted, by the county treasurer or county clerk, and the proofs of publication or posting, filed in the office of either, pursuant to any law relating to the assessment or collection of taxes, or to lands sold for taxes, shall be received as presumtive evidence of the facts therein stated."

"The rule that a party shall not dispute the validity of documents which he himself produces."

Bigelow on Estoppel, Chap. 20, page 609.
Jarstadt vs. Morgan, 48 Wis., 245.
R. R. Co. vs. Land Co., 71 Wis., 94.

Any one of these three defects in the tax proceedings is, as we have seen, sufficient, in Wisconsin, to render the tax deed absolutely void, unless the complainant can rely upon the statute of limitations as curing them. We submit that it is plain, the complainant can not rely upon the statute to cure defects which it has itself proved. This is a clear waiver of the statute. Indeed it is questionable whether or not the statute could cure the first defect above mentioned,—proof that no assessment was made, as that is held, in Wisconsin, to be a constitutional objection. And, as shown by Sec. 6, Chap. 138, G. L. 1861, quoted, *post* at beginning of point F, the proof of redemption prevents the statute from running in favor of the deed.

F.

THE LANDS WERE NOT LIABLE TO TAXATION IN THE TOWN OF SUPERIOR.

Sec. 6, Chap. 138, G. L. 1861, continued in force as Sec. 1189 R. S. 1878, provides that the limitations for bringing actions against tax deed claimants "shall not apply where the taxes, for the non-payment of which the land was sold and the tax deed executed, were paid prior to the sale, or where the land was redeemed from the operation of such sale, as provided by law, nor where the land was not liable to taxation."

Under the present head we are to consider the question whether the present case does not fall within the exception in favor of "lands not liable to taxation."

It is the rule in Wisconsin that where the county board attempts to exercise its statutory authority "to alter and change the boundaries of towns" it must follow the forms prescribed by the statute; that the statute is mandatory; that a noncompliance with its provisions, even as to matters of form, renders the order of the county board void; and in such case lands attempted to be set off from one town into another, are not "liable to taxation" in the latter town, and if taxed therein, a tax deed based upon such tax is not helped by the statute of limitations, because it is within the exception, being "land not liable to taxation."

Smith vs. Sherry, 54 Wis., 114.

The lands in question were in the town of Pokegema in 1859, 1860 and part of 1861. The town of Pokegema was vacated by order of the county board, early in 1861. Nothing whatever was done with the lands or the inhabitants of Pokegema. The board did not attach them to the town of Superior. They were suffered to remain unorganized and without town government, if that could constitutionally be done. (See exhibits and testimony referred to *ante* "K," page 11.)

At the time when this attempt was made to deprive the inhabitants of Pokegema of their right of suffrage, that right was guaranteed by Article III of of the constitution of Wisconsin to all white male citizens of the United States, and all white male persons of foreign birth who shall have duly declared their intentions to become citizens of the United States, also to certain specified classes of Indians.

The order of the county board disfranchising the voters of Pokegema, after they had been represented for two

years upon that board by town supervisors elected by them, was prohibited by the constitution of the state.

Cooley Const. lim. Fourth Edition, marginal page 616, title "The elector not to be deprived of his vote."

The exact question was decided by the Supreme Court of Michigan.

People vs. Maynard, 15 Mich., 463.

And a question in principle the same was decided by the New York Court of Appeals in another case cited by wrong page in Cooley Const. lim.

Lanning vs. Carpenter, 20 N. Y., 447.

The resolution of the county board disfranchising the voters of the two towns of Pokegema and Nemadji which towns that resolution attempted to destroy, was not merely silent as to the rights of those disfranchised electors but expressly conferred, or attempted to confer upon the electors of the one remaining town the power to elect the entire county board of three supervisors, in the following words:

"The next town meeting shall be held *in the town of Superior* to elect *three supervisors* who shall be *the county and town board of supervisors.*"

It was claimed upon the argument below that the records of the town of Superior from 1861 to 1866 (printed record pages 96 to 165) show that the town board of Superior exercised *de facto* jurisdiction over the towns of Pokegema and Nemadji.

We are unable to see how an objection of this nature can be met by showing that for five years the officers of one town uninteruptedly usurped jurisdiction over another town, even if the records of the town of Superior showed

the fact to be so. But they do not. Nor indeed is there anything to indicate that the town of Superior at any time during the entire five years except once,—in 1866, attempted to tax the property in the other towns, or in the whole county, and that they did so in 1866 is left to inference from the memorandum under date of Dec. 22, 1866, in complainant's exhibit 6, (printed record page 163,) heretofore more fully referred to as proving that the assessment was not made by the assessor. We submit that this case is ruled by the Wisconsin case of *Smith vs. Sherry, supra;* and, further, that the order vacating the town was unconstitutional.

In the court below the complainant attempted to defend itself against this objection, by relying upon Chap. 54, G. L. of 1883. We need not quote this statute, as the complainant, if it relies thereon in this court, will do so. It is a statute which provides that the "validity of an order, ordinance or proceeding purporting to set off, or organize any new town, or change the boundaries of any existing town or towns," shall only be questioned by a *certiorari* or other direct proceeding; and limiting the time, in cases of orders, &c., theretofore made, to sixty days after the publication of that act.

The statute in question certainly cures the order of the county board creating the towns of Pokegema and Nemadji, if it needed curing, but it has no reference whatever to orders vacating towns, and is no limitation upon the right to question such orders.

We do question the validity of the order vacating the towns, but the statute mentioned does not limit our right to do that. We further object, not that the county board

made a void order putting the lands in question into the town of Superior, which objection the statute in question would cure; but the objection is that the board made no order putting the lands anywhere after vacating the towns in which they were situated.

G.

THE EVIDENCE SHOWS THAT THE TAX OF 1866 WAS PAID.

We have already seen that the statutes of limitation of Wisconsin do not run in favor of tax deeds where the tax has been paid. (See statute quoted at beginning of point F, *ante* p. 41.)

The complainant examined Charles Lagro, county clerk, in reference to a certain book (page 34 of printed record.) The same witness was afterwards examined by the defendant about the same book (page 72 of printed record, questions 79 to 100.)

It appears from his testimony that the book in question purported to contain the delinquent returns for three years' taxes; that it was labeled upon the back, "delinquent 1865–6–7, lots, blocks and lands;" that the years at the tops of the pages were "pages 1 to 23, 1865; 24 to 38, 1866; 40 to 59, 1867;" and that there is nothing what ever else in the book to indicate when it was made or filed (Q. and A. 84, page 72.)

As Sec. 61, Chap. 18, R. S. 1858, *ante* p. 17, does not require the delinquent tax of any year to be returned until the last Monday in January of the following year, the presumption would be that the return of the tax of 1866 would

be found in a book bearing the date 1867. The entry in this book showing the land in question under the date 1867 contains also an entry of payment,—"Paid by H. Hayes July 20."

But complainant's theory in the court below was that the delinquent tax of 1866 was returned in that part of the book bearing the date 1866. While this theory is opposed to the presumption arising from the book and is not supported by any evidence in the case, it would not help complainant if conceded, for here is also an entry of payment (see questions 85 to 93 on page 72 of the printed record.)

It appears from this testimony that on the same page a few lines above the entry of the lands in question was written out opposite another description of lands the words "Paid July 22 E. W. A." and that this entry was dittoed down on each succeeding line to and including the lands in question here.

In reference to these ditto marks, Lagro gave the following testimony:

"Q. 89. Describe it.

Ans. Two dots.

Q. 90. Is that character the same as the marks that are used as ditto marks in the columns headed "Section" "Township" and "Range" *on that page?*

Ans. *It looks just like it.*"

It will probably not be denied that the ditto marks under this entry have the power to bring down and repeat that entry, as well as the word "Ditto" or its abbreviation "Do." Indeed it is only by conceding their power to do this that the complainant claims that the lands in question are described in the book.

The answer complainant makes to our proposal to construe these ditto marks, the same as the others on the same page, is that they were not *so intended* by the person who wrote them.

It was not shown who wrote them. I. W. Gates was county treasurer at the time; he was produced as a witness for complainant, and testified as follows,—p. 75:

"Q. 119. Do those marks opposite the entry of the S. E. quarter of sec. 28 t'p. 49 R. 14, in said book, on page 24, in any manner indicate that the taxes of 1866 were paid?

(Objected to, as it calls for judgment based upon the facts, and as incompetent, irrelevant, and immaterial.)

Ans. They were not *intended* to indicate payment.

Q. 120. Were the taxes of 1866, of $12.81 or any other amount due upon the S. E. quarter of sec. 28, t'p. 49, R. 14, paid to you as county treasurer?

Ans. In answering that *I should rely upon the book*—take the book as it is before me as evidence they were not paid.

Q. 121. Who made these marks mentioned, Mr. Gates?

Ans. They were *either made by myself or some one* authorized by me to review the printer's list."

It is seen from this, and is confirmed by the remainder of his testimony, that the witness is not testifying from memory. He disclaims, in answer 120, giving anything more than his own *impressions received at the moment he was testifying*. And in answer 121, he admits that he does not know who made the ditto marks in question. He knew that he was county treasurer at the time, and upon that he takes it for granted "they were made by myself or some one authorized by me to review the printer's list."

We are unable to see how it can honestly be argued that Gates' testimony discloses a single *fact*. Yet, if we are mistaken, and if his testimony, taken altogether, may be looked at as in some degree tending to show that the ditto marks in question were not meant as such, but as a private hieroglyphic, then we submit that the testimony was incompetent.

If the taxes were in fact paid, and if these ditto marks were made for the purpose of showing such payment, they were undoubtedly sufficient for that purpose, because that would be their ordinary meaning.

Their ordinary meaning can not be varied or contradicted by parol evidence, as was attempted in this case

In *Atkins vs. Hinman, 2 Gilman, Ill.*, on page 451 of opinion, the court, referring to these "marks" which were used in the description of lands in tax proceedings in that case, says, "the *marks* which follow the section *clearly refer* to the township and range of the two preceding tracts. This *reference* makes the description *complete* and places the matter *beyond all dispute*." See also x below

We claim only that the ditto marks under the entry—"paid July 22," should have their legitimate meaning, the same as "ditto" or "do," and that the testimony offered to show that in this particular instance they were not so intended is inadmissible.

x { Miller v. R.R. & R. Co. 52 Ind. 54
{ Stramel v. D. & O.T. Co. 57 " 457

Wharton's evidence, Sec. 824.
Iverslie vs. Spaulding, 32 Wis., 394.
Montgomery vs. Merrill, 36 Mich., 97.
Hilgers vs. Quinney, 51 Wis., 62.
Whittaker vs. Morrison, 44 Am. Dec., 627.

In Wharton's evidence, Sec. 65, it is laid down, that when the statute requires a record to be kept the record is the only proper evidence. At Sec. 824, the same author says, the record must be complete and cannot be patched by parol.

To the same effect are the cases of:

Iverslie vs. Spaulding, *32 Wis.*, *394*.

Montgomery vs. Merrill, *36 Mich.*, *97*.

These entries of payment, whichever one of them we take as referring to the tax of 1866, were each of them sufficient, under the Wisconsin statute, Sec. 4162, quoted *ante*, page 40, to prove payment. The authorities cited, following that quotation, are also in point here.

This entry of payment of the tax is corroborated by the entry of redemption in the sales books, (*ante* point E, sub. div. C, page 40) and by the erasure of the descriptions from the tax certificate (*ante* point D, objection 4, page 36.)

H.

THE TAX DEED OF 1870 IS VOID ON ITS FACE.

The Supreme Court of Wisconsin has several times decided that the recital or statement contained in the statutory form, (see *ante* page 30) to the effect that the owner has not redeemed the lands from the tax upon which the deed purports to be based, is so material that even if the words "as the fact is" are omitted therefrom the omission renders the deed void on its face; that it is not sufficient if the deed recites that "it appears that the owner has not redeemed," etc., but it must state that "it appears

as the fact is," that he has not redeemed, etc., that the words, "as the fact is" give to the clause in question the character of a certificate by the county clerk, as if he said, "it appears *and I certify* that the owner has not redeemed the lands."

Lain vs. Cook, 15 Wis., 488.
Wakely vs. Mohr, 18 Wis., 321.
Easley vs. Whipple, 57 Wis., 485.
Haseltine vs. Hewitt, 61 Wis., 121.

In the present case the tax deed, contains the words "as the fact is" —or the "*I certify*," of the statute form, but in the *body or substance* of the recital, we find the statement is that "the owner or owners or claimant or claimants of said lands *has or have not* redeemed from said sale the lands which were sold, as aforesaid.

This strange form of tax deed containing *in the alternative* the two utterly inconsistent statements that the lands have or have not been redeemed, probably arose from carelessly printing in the blank, the parenthetic suggestions found in the statute form.

Even in a case of a pleading under the code, where a *liberal* construction of language is allowed, to give effect to the pleading, it could hardly be claimed that if it were necessary for the pleader to allege that lands had not been redeemed from taxes, the statement contained in this tax deed is sufficient for that purpose.

By no known grammatical rule can the word "has" be here connected with the word "not." The grammatical meaning is "has redeemed *or* have not redeemed." The recital or statement of the deed is therefore meaningless.

Suppose the statute had required that before a tax deed should be issued, the applicant should make and file an affidavit that the owner had not redeemed the land from the sale, would an affidavit "that the owner or owners or claimant or claimants *has or* have not redeemed," etc., be sufficient? The test would be, could perjury be assigned, provided the land had been redeemed.? *The fact that it was made for the purpose of obtaining a tax deed*, would not help the case. If the language used is meaningless, when viewed without reference to the purpose for which it is used, that purpose will not serve to give it a meaning.

So held in Wisconsin in the case of an affidavit for attachment:

Miller vs. Munson, 34 Wis., 579, and cases cited.

Billings v Noble, 75 Wis. 325.

Or, suppose an affidavit of nonoccupancy to be made under Chap. 113 of 1867 quoted *ante* pages 29, 30, stating "that the said premises has or have not been in the actual possession of any person or persons;" could affiant be convicted of perjury if the premises were in fact occupied?

There is only one way of guessing at what the clause in question means, and that is by ascertaining, from an examination of the statutory form, *what words ought to be inserted in this place*. If that is a proper thing to be considered the clause might as well be left a blank altogether;—better in fact so than to fill the blank with two utterly inconsistent statements.

The statutes of limitation cut no figure upon the inquiry whether the deed is void on its face. The question is the same as if asked the day after the deed was made.

Cutler vs. Hurlbut, 29 Wis., 152, and cases cited.

And, under the rule established by the Wisconsin Supreme Court, that question is whether construing the language of the tax deed *strictly*, it is a *strict* compliance with the statutory *form?*

Wakely vs. Mohr, 18 Wis., 321.
Easley vs. Whipple, 57 Wis., 485.
Haseltine vs. Hewitt, 61 Wis., 121.
Cutler vs. Hurlbut, 29 Wis., 152.
Hilgers vs. Quinney, 51 Wis., 62.
Potts vs. Cooley, 51 Wis., 353.
Haseltine vs. Mosher, 51 Wis., 443.

In the Missouri case of *Hopkins vs. Scott, 86 Mo., 140*, it was argued by counsel that if an omitted recital could be inferred from other portions of the tax deed, its omission ought to be considered immaterial. The Court replied to this: "We concede that this *inference* may be drawn; but it does not therefore follow that * * * * * we can *infer* the omitted fact and substitute by *inference* what the law making power has said must be affirmed."

And if an *inference* may not be substituted for what the deed should affirm, even though such inference can be drawn from other parts of the same deed, surely the same rule would apply *a fortiori*, when the question is whether the inference may not be made from an examination of the statutory form, or from any other fact *de hors* the deed.

The Supreme Court of Wisconsin followed the early decisions of *Lain vs. Cook*, and *Wakely vs. Mohr, supra*, in the recent cases of *Easley vs. Whipple, 57 Wis., 485*, and *Haseltine vs. Hewitt, 61 Wis., 121*, notwithstanding the fact that their decision deprived the state of 40,000 acres of land purchased from Marathon county.

A reference to the statute form of tax deed, *ante*, will show that it provides for a statement of the amount for which the lands embraced in the deed were sold. There is an amount stated in this deed, but the recital is that such sum "was the amount of taxes assessed, due and unpaid on said tract, *or several tracts of land*." If the words "or several tracts of land" were left out, the meaning would be plain, and such as the statute required, for the statement would then be that the sum mentioned was what the "said tract"—i. e. the tract described in the deed was sold for. But, as the deed reads, that sum is not alleged to be the sum for which the tract conveyed was sold, but it is alleged to be *either* what that tract or what *several* tracts were sold for, so that the statement required by the statute form is in effect not made.

The basis of all interpretation should be the *true sense* of the words; that is, the *intention of the author*. But here is a case where it is patent that the author had no intention whatever in using the formula of words which he has used; they were made part of the blank form by accident or mistake, or possibly with the idea that the county clerk would strike out one of the alternative statements, and leave the right one. This is the only way in which he could correctly write a tax deed in such a blank; and the fact that he did not strike out one of these statements shows that he either did not examine or did not comprehend the form he was using. It is a clear case of *want of intention* and to attempt to find out an intention where the evidence is indisputable that no intention existed, would be to abuse the rules of interpretation. Because the question never is "what intention *ought* the author to have,"

but, "what intention had he?" And if it is clear that he had none, but used the given language by *mistake*, as by negligently leaving two alternative statements in a blank form, which together make no sense, then it would be contrary to the prime rule of all construction to attempt to impute a meaning to such language. When it appears that he did not *intentionally* use the given language, there can be no sense in asking what he meant by it.

That the language of a tax deed is taken most strongly against the grantee therein, is the necessary logic of the rule of strict construction, and of the Wisconsin and other cases before cited.

J.

THE TAX DEED OF 1882 IS VOID ON ITS FACE.

In *Tucker vs. Whittlesey, 74 Wis., page 74*, a similar tax deed was held to be void upon its face. The tax deed held void in that case, is referred to, upon page 82 of the opinion, in the following words: "The court below found, in effect, that this tax deed was void because it appeared on the face thereof that a large number of lots and blocks were sold together in gross for a gross sum; whereas the lots should have been sold separately. The deed itself clearly warrants this conclusion of the court as to the manner the lots were sold at the tax sale, and, this being so, the deed was clearly void upon its face."

The deed thus referred to in that case was exhibit 2, appearing in the printed record of the case, preserved in

the state library, and the material portion thereof to be compared with the deed in question here, is as follows:

"Whereas, Charles Whittlesey, of Cayohoga county, Ohio, has deposited in the office of the clerk of the county board of supervisors of the county of Ashland, in the state of Wisconsin, a certificate of Andrew Cramer, treasurer of said county, whereby it appears, as the fact is, that the following described pieces or parcels of land lying and being situated in the county of Ashland, to-wit: (Here follow descriptions of a number of lots and parts of blocks in the city of Ashland) "were for the non-payment of the taxes, sold by Andrew Cramer, treasurer of said county at public auction at Ashland, in the county of Ashland, on the first day of September in the year of our Lord one thousand eight hundred and sixty-three to Martin Beaser, and quit-claimed to said Charles Whittlesey for the sum of eleven dollars and nine cents in the whole; which sum was the amount of the taxes assessed and due and unpaid on said tract of land, together with the costs and charges of such sale due therewith at the time of making such sale, the whole of which sum of money has been paid by the aforesaid purchaser."

Comparing the Whittlesey deed with the complainant's tax deed of 1882, exhibit B, pages 42 and 43 of printed record, we find them alike in showing that there was but one certificate of sale; that neither of them states that the lands referred to were separately sold, and that they both state that the lands described were sold for the sum mentioned in each, "in the whole." There is one difference between the two deeds, and it is this:— The complainant's exhibit B contains a column headed "total amount,"

and in this column sums are entered opposite each parcel of land mentioned in the deed, and the aggregate of the sums thus mentioned is the whole sum of $44.65, which the deed says all the lands described therein were sold for, but there is no reference, or allusion to these sums anywhere in the deed, nor any explanation of their meaning.

The Wisconsin statute on the subject of tax sales is section 7 of chapter 22 of the G. L. of 1859, re-enacted as section 1136 R. S. 1878, and is as follows:

"The person offering at such sale to pay the taxes, interest and charges on any tract of land for the least quantity thereof, shall be the puchaser of such quantity, which shall be taken from the north side or end of such tract, and shall be bounded on the south by a line running parallel with the northerly line thereof, if such line be a single straight line, otherwise the south line of the portion so sold shall run due east and west; and in case no bid be made for the payment of the taxes, interest and charges, on any such tract of land for a portion thereof, then the whole of such tract shall be sold."

It is plain, that this statute requires each parcel of land to be put up separately for competition among bidders, *and sold separately*, and that a single bid by one person to purchase several tracts for certain specified amounts for each tract, would be void. It was just as invalid, in other words, to sell the lots described in exhibit B. to Hiram Hayes in a lump at separate prices, for each lot, as to sell the whole of it in a lump at a lump price for the whole.

In *Ortor vs. Vooman, 25 Wis., 672*, the Supreme Court held a similar defect to be explained by the following recital in the tax deed in that case: "Said lots and tracts of land having been *separately* sold for the several sums respectively above stated." No such statement is made in exhibit B.

K.

THE TAX DEED OF 1882 WAS VOID BECAUSE THE LAND WAS REDEEMED FROM THE TAX SALE.

This is another of the objections which the Wisconsin statute of limitation does not cure. See statute page 41 *ante*.

It appears from the complainant's pleadings and proofs that after the tax deed of 1870 was issued, Hiram Hayes, the grantee therein, claimed to be the owner of the land. Complainant's exhibit 4 shows that Hiram Hayes was, during all the period between the issuing of these two deeds, regarded as owner by the officers who attempted to carry on the various tax proceedings. The payment of taxes or pretended taxes for these years, in so far as complainant attempted to prove such payment, are all in the name of Hiram Hayes. We mention these facts, not as disqualifying him from taking another tax deed, but as relevant upon the question of *intention to redeem*, by the transaction between himself and the county, now to be considered. If by that transaction the parties *intended* that the tax should be paid, then it was thereby paid; and Mr. Hayes could not four years afterwards, by changing his mind, change the fact.

The evidence shows that Hiram Hayes is an attorney, residing and practicing at Superior, Douglas county, and that, as such attorney, he was employed by the county to defend certain actions, and had an account against the county for such services, and the county had an account against him for tax certificates and taxes upon his lands to the amount of $355.77, and it included *certificate No. 325*,

on sale of 1877. Hiram Hayes presented a lump bill against the county, and made the amount of it exactly enough to balance the county's bill against him, $355.77. A resolution of the county board authorized the county clerk "to assign and transfer to Hiram Hayes the outstanding certificates upon *his* property to be received by him on account for legal services," etc.; and the affidavit of Hiram Hayes attached to his bill shows that the bill "has been paid by being turned on account of *affiant's taxes.*" The resolution of the county board authorizing this transaction was adopted June 22, 1878. A certified copy is among the defendant's proof (exhibit J.) A certified copy of Hiram Hayes' bill against the county, and of his affidavit, is also in evidence (defendant's exhibit K.) The entries of the account of Douglas county against Hiram Hayes (see testimony of Chas. Lagro, county clerk, page 73 of record) show that that account is headed "Hiram Hayes, Dr. to Sundries on Res. June 22, p. 342;" meaning, evidently, "resolution of June 22d," which was the resolution authorizing the county clerk to assign to Hiram Hayes, in payment of his account, tax certificates upon *his* lands. (See exhibits J and K, pages 81 and 82 of printed record.)

It would be difficult to imagine clearer proof of *intention* upon the part of Hayes and the county board that the transaction should amount to a redemption of the lands from the tax.

Against all this, complainant's counsel had only this to urge in their brief in the court below: "We insist that the significant part of the transaction is that the certificate was assigned, and the tax not marked redeemed, and that a deed was afterward issued upon it." But this argument,

weak as it is, rests upon the *assumption* that the certificate in question—No. 325, of 1877, was *assigned* to Hiram Hayes. Such is not the proof. No assignment is endorsed upon or attached to the original, and it could be assigned in no other way. (See defendant's exhibit G, printed record page 79.)

Eaton vs. Supr's, 44 Wis., 489.
Horn vs. Garry 49 Wis., 464.

And, even if the assumed fact that the certificate had been assigned was true, neither that nor the fact that no entry of redemption appeared upon the 1877 sales book has any particular significance in a case where the owner buys the certificate. The sale would not be marked redeemed until Hayes offered the certificate for that purpose. This form is oftener neglected than observed, because the owner of the land is no better off for holding a certificate of redemption than the certificate of sale, and as the former costs him something, and is worth practically nothing, he generally prefers not to get it, but to keep the certificates of sale. Any person who finds the land in the treasurer's sales book, will also find an entry of the fact that the certificate is assigned and the name of the assignee, and this protects him as well as an entry of redemption; and, indeed, it is redemption.

Whiton vs. Rock, 16 Wis., 44.
Smith vs. Lewis, 20 Wis., 350.
Lybrand vs. Haney, 31 Wis., 230.
Lacy vs. Johnson, 58 Wis., 414.
Wilcox vs. Bates, 45 Wis., 138.
Woodbury vs. Shackelford, 19 Wis., 55.
Lindsay vs. Fay, 28 Wis., 177.

L.

THE RECORDS OF BOTH TAX DEEDS ARE VOID.

In Wisconsin the purpose and effect of recording tax deeds is peculiar,—is not the same as in the case of ordinary conveyances. Before record the tax deed is a mere lien. By the record it is changed to an absolute title. Section 18, Chap. 22, G. L. 1859, re-enacted as Sec. 1165, R. S. 1878, is as follows:

"Section 18. The owner or occupant of any land sold for taxes, or any other person * * * * may redeem any such lands, or any part thereof, or interest therein, at any time before the tax deed executed upon such sale is recorded, and when so redeemed such deed shall be void."

Before record of the deed the tax title is only a lien.

Hewitt vs. Week, 59 Wis., 444.

We come now to the inquiry:—What is meant in Wisconsin by "recording" a deed?

Hitherto, in this brief, the decisions of the Supreme Court of Wisconsin which we have cited have been harmonious and consistent with each other. But in regard to the foregoing question they have not been so. The statute on the subject is quoted *ante* pages 18, 19.

In three cases the Supreme Court of our state have held, substantially, that if the deed is transcribed at length in the office of the register of deeds the statute requiring entries to be made in the index may be disregarded.

Oconto Company vs. Jerrard, 46 Wis., 317.
St. Croix L. & L. Co. vs. Ritchie, 73 Wis. 409.
Hall vs. Baker, 74 Wis., 118.

On the other hand, in three cases, our Supreme Court has held that the transcribing of the deed at length is not

a statutory requisite at all; that the indexing is the one and only thing required by the statute, in order to make the instrument a "recorded instrument."

Shove vs. Larsen, 22 Wis., 142.
Lombard vs. Culbertson, 59 Wis., 433.
Hay vs. Hill, 24 Wis., 235.

The decisions holding that the transcribing of the deed at large is what is meant by "recording," may all be sufficiently illustrated by the first of them in point of time, the case of *Oconto Company vs. Jerrard.* It is a good case for this purpose, because the question involved was as to the record of a tax deed, and because the most important of all the index entries, *of a tax deed*, to-wit: the description of the land, was omitted from the index, and yet it was held that the deed having been transcribed at large it was sufficiently recorded.

The Jerrard case, then, goes as far as it could be possible to go in holding that the index is of no importance after the instrument has been transcribed at large. The key note of that decision is the maxim *certum est quod certum reddi potest.* The index merely contained the words "see record," in the place where the statute required the description of the land to be entered; the court held that when the deed was transcribed at large the reference "see record," under the above maxim, became a description of the land. Of course the same result would follow from the same entry in any other column of the index:—"Name of grantor, see record." "Name of grantee, see record." "Name of instrument, see record." etc., etc. The decision annuls the statute requiring an index, or makes its purpose merely temporary, as a sort of record *pro tem.*

In the other class of decisions above mentioned the court holds quite different language. In *Shove vs. Larsen, supra*, it is said, referring to the statute quoted *ante*, pages 18, 19:—"It will be at once seen that the above provision makes the index a record. * * * * It is not necessary that the instrument be actually transcribed at large upon the record." And in that case it was held that where the land was correctly described in the index, but misdescribed in the transcription of the deed in full, the record was good. In *Hay vs. Hill, supra*, upon a similar question, the court said:—"It is only the entry in the original minute book, which correctly described the land embraced in the mortgage, which can be relied on for that purpose." In Lombard vs. Culbertson, *supra*, the court says:

"Section 143, declares that when the proper entries are made in the general index, as prescribed in section 142, the conveyance shall be deemed recorded. This section is the only section which declares what shall be deemed a recording of any conveyance of real estate under the recording laws of this state. Sec. 140 of said Chap. 13, which makes it the duty of the register to record at length in suitable books to be kept in his office all deeds, etc., authorized by law to be recorded in his office, does not declare that when he has so recorded them at length they shall be deemed recorded for any purpose."

But, so far as tax deeds are concerned, this vexed question has now been set at rest in Wisconsin by the case of *Lander vs. Bromley, 79 Wis., 372*, where the Supreme Court of Wisconsin, following an intimation of that eminent jurist, Chief Justice Dixon, in an earlier case, has adopted the rule that in the case of tax deeds, both indexing and transcribing at length are essential to a valid record. We quote from page 377 of that opinion as follows:

"This court has frequently held that a tax deed, void upon its face, does not carry the constructive possession, nor operate as constructive eviction." Cutler vs. Haribut, 29 Wis., 152; Easley vs. Whipple,

57 Wis., 485; Warren vs. Putman, 63 Wis., 410; Semple vs. Whorton, 68 Wis., 626. The same rule must necessarily apply to the record of a tax deed void upon its face; and this must be so whether such record is a correct transcript of a deed void upon its face, or a false transcript of a deed valid upon its face. In other words, in order to make the record of a tax deed set the statutes of limitation in motion, it must appear therefrom that it is the record of a tax deed valid upon its face. The mere clerical omission from such record of such deed of a word necessarily implied from the context, and hence not affecting the sense, nor obscuring the meaning, would not impair the deed, nor destroy the effect of such record. St. C. L. & L. Co. vs. Ritchie, 73 Wis., 409. But the substantial requirements of the statutes must appear from the record itself. Even where a tax deed valid upon its face is delivered to the register for record, and by him correctly recorded at length in the record book, yet it is not to be considered as recorded until the proper entries thereof are made in the general index required to be kept by the register, and until then it does not set the statute of limitation in motion. Lombard vs. Culbertson, 59 Wis., 433. Where there is a defect in such index, which is subsequently corrected, the record is only effectual from the time of such correction. Ibid. See, also, Int. Life Ins. Co. vs. Scales, 27 Wis., 640. In other words, it is not only essential that there should be a record of a tax deed, valid upon its face, but the requisite index to such record. The false statement in this record is of such a character that it was not and could not be helped out by the index. THE QUESTION HERE INVOLVED IS NOT ONE OF NOTICE, ACTUAL OR CONSTRUCTIVE, but whether there was a substantial record which set the statutes of limitation in motion, and we must hold that there was not."

This decision makes both the record at large and the proper index entries essential to the valid record of a tax deed. And in the case of *Life Ins. Co. vs. Scales, 27 Wis., 640*, cited by the court in the above quotation, the language of Dixon, C. J., is as follows: "Section 143 declares that a deed entered in the index, as prescribed by Section 142, shall be considered as recorded at the time so noted; and this court, in Shove vs Larsen, 22 Wis., 142, gave effect to that provision for the purpose of charging a subsequent purchaser with notice. See also, *Hay vs. Hill, 24 Wis., 235*. But whether like effect would be given to the same provision for the purpose of cutting off the right of redemption under a tax deed, is quite another question. The right of redemption is favored in the law, and for the

purpose of aiding it the courts might perhaps reasonably construe the statute authorizing it in the language above quoted to signify or intend an actual recording *in extenso*, or copying of the deed at length in the record book, which is undoubtedly the primary and ordinary signification of the word "recorded," used in the statute. But whether the courts would so decide or not is not a question here."

And in the still more recent case of Hiles vs. Atlee, 80 Wis., 219, that court intimates strongly that the rule announced in Lander vs. Bromley should apply to all deeds; but certainly to tax deeds; we quote as follows from the opinion:

"Such should certainly be the rule in respect to tax deeds by which the original owner is divested of his title by proceedings purely statutory, and which, to be available, must be strictly pursued. Potts vs. Cooley, 51 Wis., 355; Ramsey vs. Hommel, 68 Wis., 15; Hiles vs. Cate, 75 Wis., 101. It is to be remembered that a tax title claimant cannot maintain ejectment until his tax deed is recorded, and that it cannot be considered as recorded until the proper entries of at least the essentials are made in the general index. Hewitt vs. Week, 59 Wis., 444; Lander vs. Bromley, 79 Wis., 372; Cornell University vs. Mead, post, page 387."

And in that case the court held the record of a tax deed void because the names of the grantors—the state and county—were not entered in alphabetical order upon the general index.

It is also a significant fact that in these two recent decisions the Supreme Court of Wisconsin has avoided all reference to or citation of the *Jerrard* case and kindred decisions, relied upon by the complainant.

Nothing can be clearer than that, in these later cases, the Supreme Court of Wisconsin takes the ground that the early rule of *Shove vs. Larsen*, *supra*, holding that ordinary conveyances may be recorded by making the index entries alone, is not applicable to tax deeds; that the

latter can only be recorded by both indexing and transcribing in full, and that an error either in the index or record at large vitiates the whole record; *that the record of a tax deed is as much a part of the tax proceeding, as the execution of the deed is, because the act of recording changes into an absolute title that which before was a mere lien;* and that in the language of the Wisconsin Court in the Lander case, *supra*, "the question involved is not one of notice actual or constructive," in the case of recording tax deeds, as it is in the case of recording other deeds; but it is a question of the vesting of such title in the tax deed grantee, that an action of ejectment may be brought against him by the former owner, and which will for that reason set the statute of limitation running against such former owner; and that when the question involved is the record of a tax deed, the rule of strict construction applies to that as to other tax proceedings, so that the title does not vest without a strict taking of all the steps required by the statute upon the subject of recording, strictly construed.

The Wisconsin reports are interspersed throughout with decisions enforcing the rule of strict construction in such cases. We select for citation here three from a single volume. Many others have been heretofore cited in this brief, under other heads.

Haseltine vs. Mosher, 51 *Wis.*, 443.
Potts vs. Cooley, *ibid*, 353.
Hilgers vs. Quinney, *ibid*, 62.

In the Jerrard case this very obvious fact, that the record of a tax deed is an absolutely essential step in the *tax proceeding*, and a step of supreme importance, was not apprehended, as will be seen from the following remarks in the opinion in that case:

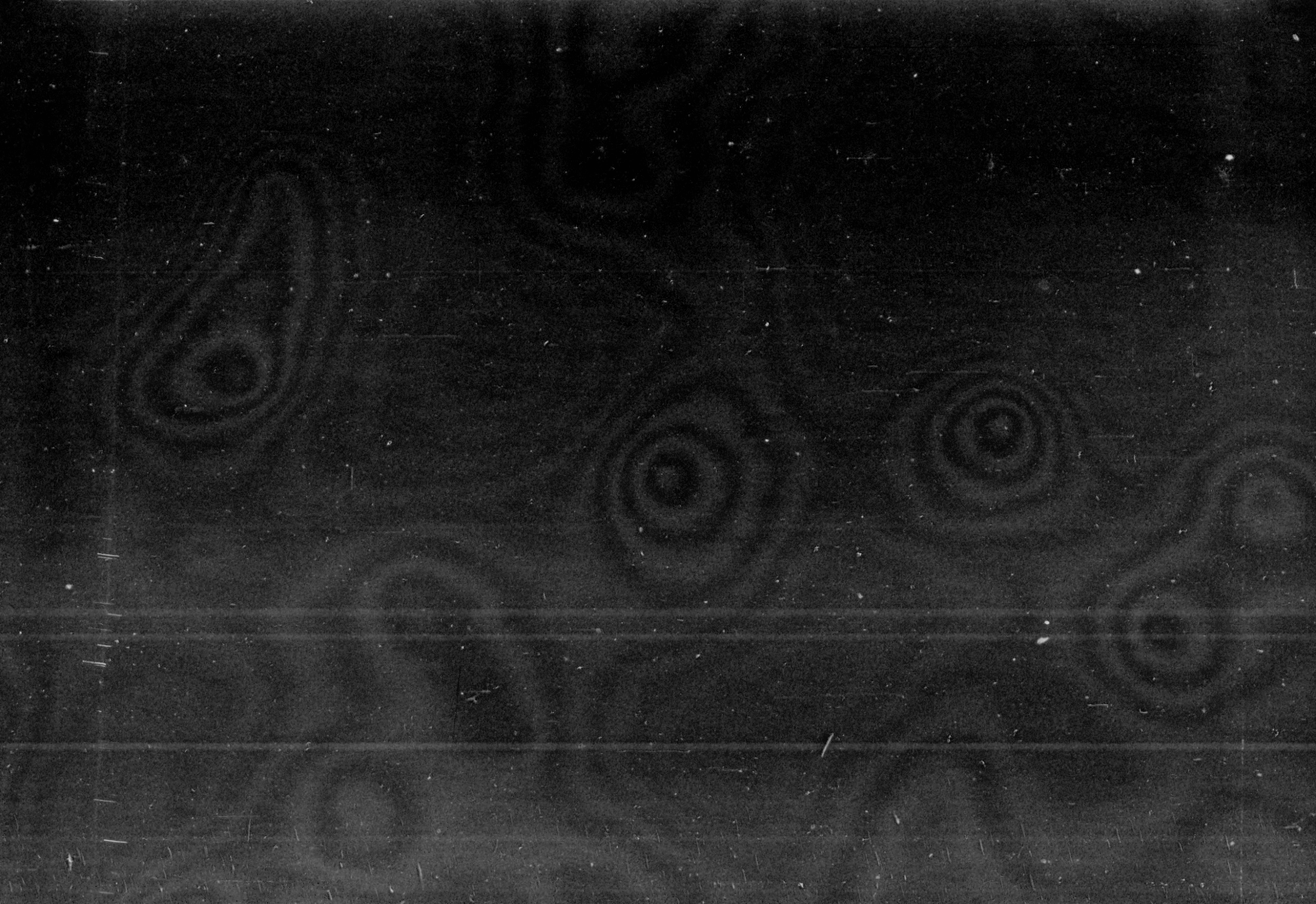
consin court has, for the very best of reasons, refused to apply to tax deeds, in the later cases of *Lander vs. Bromley and Hiles vs. Atlee, supra*, by which decisions the former ones are clearly overruled.

2. In the case of the tax deed of 1870, the following errors appear in the index entries. The description entered upon the general index is "south east half." In the column headed "Section" there is no entry of any number of section. In the column headed "Town" is the number "28." In the column headed "Range" is the number "49." Thus the total description upon the index reads: "South east half of town 28, range 49." (See photograph, exhibit C.) See ante Ft. pp. 8-9.

On the argument below the only answer that was made to this was that it was obviously "an impossible description," not only bad but so very bad that it could not mislead; in short bad enough to be, in a sort, good, because the searcher of the record would see at once that it was wrong and would look to the record at large to find the right description. That sort of argument will not now aid complainant to escape the effect of the fatal defects in this index, under the rule established by the Wisconsin court since the judgment below was rendered. This is not a question of notice, or putting upon inquiry.

But the record at large of the tax deed of 1870 is also void.

The original tax deed of 1870 attempts to describe the land in the same manner in which the statute authorizes lands to be described in assessment rolls, tax rolls and delinquent returns, that is by a tabular statement, consisting of *ruled columns with headings.*



We submit that it must be seriously questioned whether this method of description is lawful in tax deeds in Wisconsin, *as it is not authorized by statute and was not known in the common law.* But surely if permitted at all in tax deeds the ruled columns should be made. In the record at large of the deed of 1870 the *ruled columns are omitted.* So there is nothing to indicate that it was designed even as a tabular statement. The description is simply "Description. Section. Town. Range. Number of acres. Total amount. South east quarter of28, 49, 14, 160, $14.23:"—a mere jumble of words and figures having no meaning whatever in the absence of the proper column rulings, which would compel the reading of each column downwards.

Wherever a description by means of ruled columns with headings is permissible, the rulings are obviously an *indispensible* part of the description. The purpose of the rulings is to divert the direction of the reading, to make the lines of reading vertical instead of lateral. An omission to record the rulings is an omission to record an indispensible element of a description by columns with headings. We have found no reported case where such an omission occurred.

The so-called copy of general index.

Complainant's counsel, to prove that the deed of 1870 had been properly indexed, offered in evidence exhibit No. 3. (Printed record, page 167.) This purports to be a certified copy of an entry in the original general index. Then the defendant introduced the photographic copy of the original. This was substantially unlike the certified copy. It was then conceded by the complainant that

exhibit 3 was not a copy of the original, but a copy of a copy of the original. (Printed record, page 76.)

In this so-called copy of the original index, the entries have been made which the statute required to be made in the original, except the names of the grantors, and the only contention of complainant in regard thereto, which we deem worthy of notice, is the contention that the alterations therein made may be treated as corrections of the original.

The entries which the law requires to be made in the general index, are required to be made *from the original deed*. This is necessarily so because they are required to be made before the deed is transcribed in full. It follows, necessarily, that no correction of the general index can be permitted that is not made from the original deed.

As the record is not complete, in the case of tax deeds, so as to set the statute of limitation running, until the correct entries are made in the general index, it would follow, logically, that if the tax deed in question was recorded at length September 7th., 1870, but the correct index entries were not made until several years thereafter, the date to be inserted in the column of the index headed "Date of filing" should be the day at which the index was made, and not the date at which the deed was recorded at length. In the present case the entry in the book from which complainant's exhibit 3 was copied is false, because it states that it was made September 7th., 1870, whereas the testimony shows that it was not made in fact until several years thereafter, and precisely when it was made does not appear from the testimony, but the certificate which states it to be a copy of the original bears date Nov. 9th, 1875. (Printed record, page 87, exhibit 11.)

This so-called copy was not used as an original, nor so regarded by the public. It was not used at all by the local examiners of titles. Morrison, the register, tried to get them to use it, but they would not. They had full and complete access to the original, knew which book was the original, and *invariably* consulted it instead of the copy, (printed record, page 90, testimony of James S. Ritchie and James Bardon.)

Counsel for complainant argued in the court below that this copy was made under Chap. 201 of 1860 and Chap. 284 of 1875. If they still make the same claim these laws will doubtless be set out in their brief. The contention is obviously a mistaken one. The book was made under authority of the former act alone, and before the latter took effect. The first resolution of the county board directing the register of deeds to make it, was passed May 28th, 1872. The second resolution directing him to *complete* it, was passed July 2, 1873. The act of 1860 was the only act in force when these resolutions were passed, and while the copy was being made; it was not repealed by the act of 1875, and is therefore the law governing this case. This is further apparent from the revisor's note to Sec. 690 R. S. 1878, showing that section to be compiled from *both* of said acts, and consequently that both were in force up to the date of the revision.

The law of 1860 under which the copy was made, directs that the officer making the copy "shall certify that he has carefully compared the matters therein contained and written and that the same is a correct and literal copy of the book from which the same was transcribed, naming such book."

The certificate attached to the book in question is shown by complainant's exhibit 11, page 87, and does not state that the register "carefully compared the matters therein contained and written;" nor that the same is "a correct and literal copy" of the original.

The revision of 1878 preserves the law of 1860 in preference to that of 1875, as to the substance of the certificate required. But even the law of 1875 did not authorize anything save *a copy*. It directed the officer making the copy to "*accurately transcribe*" the original, to certify that it was a "correct transcrip" therefrom, and it provided that "the copy *so made* shall have *the same* effect as the original." Here, however, is a copy *not* "*so made*," and which, therefore, has not the same effect as the original, nor any effect, under the act of 1875, upon which act complainant apparently relies.

The act of 1860 also requires that the resolution authorizing the copy to be made, shall be recorded in the office of the register of deeds; these resolutions were not, at least complainant did not attempt to prove that they were.

The act of 1860 provides that "such copy *so certified* is hereby declared to be a public record, and as such shall in all respects have *the same effect* as the book from which the same was transcribed." This copy is not "so certified," and therefore has not the same effect, nor any effect as evidence.

We do not take issue with the authorities cited by counsel for complainant, to the point that the register may correct his records. Those authorities would be in point here if the register had corrected the original index. As he did not do that, they are inapplicable.

Referring to the testimony of Edwin V. Mundy, (pages 64, 65, 66 of record,) we find that the index of instrument number B. 11679, which is the deed in question, contains no description of the lands. The column which the statute requires to be filled out with a description of the lands is filled out "lands in Douglas county, see record." In the place where the book and page should be entered the page is not entered. In the column headed "Date of filing" the year is omitted, month and day only being given. The name of the state of Wisconsin as grantor is omitted.

The record at large of the deed of 1882 is equally defective; the copyist forgot or neglected to copy the headings of the columns, so that there is nothing to show what the figures entered in the columns mean. (Defendant's exhibit D, page 170.) In this case the "see record" of the index, is not only pert but jocular, for, when abashed at the verdancy which kept us from "seeing record" until we were told to do so, we humbly turn from this index which tells us "see record" but doesn't tell us what page, and after a search, find a page which purports to be a record of instrument B, 11679, we find ourselves to be the victims of a practical joke. We "see record" but we don't see any land described there. Both index and record at large are clearly void.

Lander vs. Bromley, 79 Wis., 372.
Hiles vs. Atlee, 80 Wis., 219.

In the court below complainant's counsel cited cases in other states where defective records have been sustained on the ground that they were *sufficient to put one examining them upon inquiry*. If these or similar cases shall be

cited in the brief for complainant in this court, we have no reply to make to them except that, under the rule in Wisconsin as to the essentials of a valid record of a tax deed, these authorities have not the remotest application to the question presented here. As the Wisconsin court says in the *Lander case, supra*: "*The question here involved is not one of notice actual or constructive.*" The question is whether the deeds have been recorded in such a manner as to change the lien of the tax deed grantee to an absolute estate, and to cut off the original owner's right of redemption, and to set the statute of limitations running which by its terms runs only from the "recording" of the tax deed. It is not, even in a remote sense, a question of "putting on inquiry," or "priorities," or notice actual or constructive. *It is a question of the strict and literal accomplishment of what is, in the plainest sense of the term, a "tax proceeding;" and an extremely important tax proceeding in its purpose and consequences.*

M.

THE LIMITATION IN AID OF VOID TAX DEEDS.

Upon the argument below, counsel for complainant relied upon Chap. 35, of the laws of 1885. If they still rely upon it their brief will doubtless contain a copy of the law. It is a law in aid of tax deeds that are void upon their face; but it does not run in favor of such tax deeds unless the holder thereof has paid *taxes which it was the duty of the land owner to pay* for three years next after

recording such void tax deed; and it applies only to cases where such payments were made prior to the publication of that act.

Webster vs. Schwears, 69 Wis., 89.

Therefore that law could not possibly apply to the tax deed of 1882, as the third year's tax thereafter—the tax of 1885, could not have been levied when that law took effect, and complainant's receipt therefor bears date January 9th, 1886.

To bring either of the deeds within the protection of that statute, it was incumbent upon complainant to prove the payment of *valid taxes*, because there is no duty imposed upon the owner of the land to pay any other.

Webster vs. Schwears, supra, 69 Wis., 89.

Plumer vs. Marathon County, 46 Wis., page 182 of opinion.

But, instead of proving that valid taxes were levied upon the land, which it was the owner's "duty" to pay, and which he was in "default" for not paying, the complainant actually proved, by its exhibit 4, that the lands in question were not entered upon any assessment or tax roll for 1871, or 1872—two of the three years following the record of the 1870 tax deed; and also proved that the lands in question were not entered upon any assessment roll for the years 1883, 1884, or 1885, following the record of the 1882 tax deed. Exhibit No. 4 contains no reference to any of the assessment rolls herein mentioned, and the joint certificate of the county treasurer and county clerk attached thereto, shows that said exhibit contains a reference to all the tax records in which the lands in question appear described.

We submit that the entry in this book does not satisfy the statute requirement of a general index; because not made in the original record; and because false as to date. And we submit further that the book in question is not evidence under the statute authorizing copies of shattered original records to be made, because it is not a copy, but an alteration of the original, and it does not contain the certificate required by those statutes.

The record of the tax deed of 1882.

If the complainant contends that its tax deed of 1870 was recorded in November, 1875, when the so-called copy of the general index was completed, then the taxes involved are those of 1876, 1877, and 1878, and exhibit 4 shows, that the land was not entered upon any assessment roll for those years.

The statute in question cannot be relied upon because it was not pleaded by complainant in the original bill.

Smith vs. Dragert, 60 Wis., 139.

Paine vs. Comstock, 57 Wis., 159.

Morgan vs. Bishop, 56 Wis., 284, and cases cited upon page 286.

To obviate this difficulty, complainant's counsel insisted in the court below, that the statute in question could be relied upon because the facts showing its application were pleaded in the supplemental bill.

But, there is nothing of the sort in the supplemental bill. It does not allege that the tax deeds are void on their face; does not mention the statute; nor does it say anything about payment of taxes by the tax deed grantee, or non-payment thereof by the original owner; there is an attempt

at something of the sort in the original bill; but it is clearly insufficient under the authorities above cited.

To bring the case within the law of 1885 it was also incumbent upon complainant to prove that the former owner did not pay the taxes *lawfully levied* upon the land for the four years next preceding the alleged recording of the tax deed. The years involved would be as to the tax deed of 1870, the taxes of 1867, 1868, 1869, and 1870. Complainant's exhibits C, D, E, and F, are receipts for these taxes, in the name of Hiram Hayes, who at the time had no title to the land. The payments would therefore necessarily inure to the benefit of the former owner.

Lewis vs. Disher, 32 Wis., 504.

Complainant also proved, by its exhibit 4, that the lands in question were not entered upon any assessment or tax roll, from the year 1867 to the year 1872; and that they were not entered upon any assessment or tax roll for any of the four years preceding the recording of the tax deed of 1882, nor upon any assessment roll for any of the four years preceding the time when the so-called copy of index was made.

Any one of these many reasons are sufficient te take the case out of the protection of the limitation of 1885 in aid of void tax deeds.

Webster vs. Schwears, supra, 69 Wis., 89.

N.

REGARDING COMPLAINANT AS A LIEN HOLDER.

This point assumes, for the sake of argument, that complainant's suit is not barred.

The statute under which complainant claims this remedy (*ante* page 2,) and also the statute quoted *ante* 15, by which appellant claims the case is ruled, and barred, both allow the action to be brought by the holder of an unrecorded tax deed,—or in other words "The holder of a lien." (But the former statute did not apply to lien holders until the last clause thereof was added to the former law, by the revision of 1878; see report of joint special committee on revision, page 84.)

Therefore the argument herein made to sustain the point that the tax deeds were not properly recorded, does not, *upon that ground*, contest the right of complainant to maintain this action; but only shows that the statute of limitations upon which complainant relies has not run in favor of its tax deeds and against the former owner, and so, therefore, that all objections which at any time existed to the tax deeds may be made now.

The statute of limitations relied upon by the respondent is a statute barring an action "to recover possession of land;"—in other words an action of ejectment. If that statute has not run in favor of respondent, then any defects intermediate the tax sale and the tax deed may be shown now, to avoid the deed, whether such defects be or be not those mentioned in the law of 1861 (quoted *ante* p. 41,) which are excepted from the statutes of limitation.

Many such defects were shown, for example:

1. *As to both deeds:*

a. Lands not described in the tax certificates; see *ante* p. 36.

b. Tax certificates not assigned; see *ante* p. 36.

c. Complainant's exhibit 4, which is certified to show *all* tax proceedings against the lands in question, does not show that they were described in any advertised list for redemption. The statute on that subject is as follows:

Sec. 16, Chap. 24, G. L. of 1859. "The clerk of the board of supervisors in each county shall, at least six months before the expiration of the time limited for redeeming lands sold as aforesaid, cause to be published in a newspaper * * * * a list of all unredeemed lands, specifying each tract or lot, the name of the person to whom assessed, if to any, and the amount of taxes, charges and interest, calculated to the last day of redemption, due on each parcel, together with a notice that unless such lands be redeemed on or before the day limited therefor, specifying the same, they will be conveyed to the purchaser."

2. *As to the tax deed of 1870:*

a. Insufficient proof of notice of tax sale; see *ante* p. 35.

b. Richard Relf, who signed it, was not an officer, *de jure* or *de facto;* see *ante* p. 38, 39, 40.

3. *As to the tax deed of 1882:*

a. Name of purchaser at tax sale not entered in sale book; (printed record page 70 Q and A 69.) On this point the statute is as follows:

Sec. 15, Chap. 22, 1859, re-enacted as Sec. 1141, R. S. 1878: "Every county treasurer shall, immediately after the close of the sale of any lands for taxes, deposit in the office of the county clerk all affidavits, notices and papers in relation to such tax sale to be filed and preserved therein; also a statement containing a particular description of each tract, or parcel therof, of land so sold by him, SPECIFYING THE NAME OF THE PERSON TO WHOM SOLD, the amount for which the same was sold, and the name of the owner, if known; and the said treasurer and clerk shall each record such statement in their respective offices."

The record of such statement is called the "sale book." It is prima facie evidence of the facts stated in it; but it is not evidence of the validity of the taxes.

Eaton vs. Lyman, 33 Wis., 34.

If the tax deeds were not legally recorded, the foregoing objections are each and all admissible against them, regardless of the point discussed *ante* p. 30 *et seq.*:—that complainant waived the statute.

O.

MANDATORY STATUTES.

In many of the statutes herein quoted will be found the words "shall" or "shall not," in provisions prescribing the duties of officers to do, or refrain from acts; e. g.

Page 17 *ante*, Sec. 59: "It *shall* be the duty of the town clerk." Sec. 60: "A warrant under the hand of the town clerk *shall* be annexed."

Page 19, *ante*, Sec. 142: "Every register of deeds *shall* keep a general index, each page of which *shall* be divided into eight columns with heads to the respective columns as follows:" Sec. 143: "Such register *shall* make correct entries in said index * * * * * under the respective and appropriate heads," and he *shall* enter in the appropriate columns * * * * the day, hour and minute of reception."

Page 29, *ante*, Chap. 460 of 1864: "The clerk of the board of supervisors shall not issue a deed," etc. Chap. 113 of 1867: "Such deed shall not be issued." "And in no case shall any tax deed be issued."

See also page 56 *ante*; and statutes quoted under point N, page 78.

Statutes of this nature are held to be mandatory in Wisconsin.

Wendell vs. Durbin, 26 Wis., 390.

And such is the general rule, elsewhere.

Mason vs. Fearson, 9 How. U. S., 248.

CONCLUSION.

We respectfully submit that the following propositions are established in this case:—

1. Complainant's suit is barred.

2. Complainant failed to prove title, by failing to properly prove its tax deeds before offering them in evidence.

3. Both tax deeds are void upon their face.

4. Both tax deeds are void because the lands were not liable to taxation in Superior.

5. The tax deed of 1870 is void because the tax upon which it was based was paid.

6. The tax deed of 1882 is void because the land was redeemed from the tax sale upon which it was based.

7. Both tax deeds are void on grounds shown by the complainant's proofs.

8. Both tax deeds are void on grounds shown by defendant, the complainant having waived, by its own proofs, the benefit of the statutory presumption in aid of the deeds.

9. Neither of the tax deeds was recorded so as to be protected by the Wisconsin statutes of limitation.

W. C. SILVERTHORN, HURLEY, [illegible] JONES.

Counsel for Appellant.

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157-327

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 138.

THOMAS BARDON,

Appellant,

vs.

LAND AND RIVER IMPROVEMENT COMPANY,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

This is an appeal from the Circuit Court of the United States for the Western District of Wisconsin. The opinion of the Circuit Court will be found in 45 Fed. Rep. 706.

I.

THE TAX DEED OF 1870 WAS DULY RECORDED.

The most important question under consideration is, Was the tax deed of 1870 duly recorded? Question is indeed made whether the taxing officers had jurisdiction, and whether the deed is fair on its face; but inasmuch as the supreme court of Wisconsin, in the case of *Dupen v. Wetherby*, 79 Wis. 205, has sustained a tax deed issued by the same county on the same tax sale (1867), we think we may with some confidence insist that if the tax deed in question was duly and properly recorded, it is valid and sufficient, and the title of complainant perfect.

In Wisconsin the record of the tax deed marks the end of the period of redemption, and the beginning of all periods of

limitation known to the law of that state. At any time before the deed is recorded the owner may tender the redemption money and defeat the tax title. At any time within three years after record he may bring suit to impeach the tax deed by proof of defects in the proceedings upon which it is based; or, if suit be brought against him within the three years, he may, on like proof, defeat the plaintiff's tax deed. But after the three years have run he may no longer give proof of irregularities in the tax proceedings, but can only offer proof going to the jurisdiction; such as the payment of the tax, or want of jurisdiction to levy the tax or sell the land.

It would, as we respectfully submit, be difficult to find a more proper case than this for the application of these reasonable and well-settled rules. The complainant bought this land and paid for it, relying wholly on the tax deed and the limitation laws applicable thereto. It took possession and built a fence. It laid out, in improvements near by, over a million dollars, thereby giving the land its present value, and inviting the present attack by the appellant. By the sagacity and outlay of its managers the land has become quite valuable, and it is submitted that its foresight should not be disappointed, unless violence will thereby be done to some settled principle of law. See the printed record, pages 56–60.

On the other hand, the defendant does not appear in this case in the most favorable light. He has not a dollar invested in the land. The consideration of his deed is one of "family interest" merely. Neither he nor his grantors have ever paid a cent of tax, made any improvements, exercised any ownership, or done anything to add to the value of the land. P. Rec. 62.

Thompson v Carroll 22 How. 422

Local statutes and decisions as to limitations.— An examination of the legislation and judicial decision of Wisconsin shows a most enlightened and consistent policy in respect to tax titles. Such a policy was almost a necessity. A large part of the soil has been and is still vacant and unoccupied, covered with forest and marsh and pine barren. Local necessities of revenue have fostered a policy of justice and steadiness in dealing with tax titles — a policy sufficiently strict against them to enable a willing but indigent owner to pay, but sufficiently liberal in their favor to insure the ultimate collection of the taxes and the stability of titles themselves.

These objects have been successfully attained by giving the owner from six to six and one-half years in which to pay or redeem, and three years more in which he may, in almost if not all cases, defeat the tax title and regain the land by showing defects in the proceedings leading up to the tax deed; and by sustaining titles dependent upon lapse of time and the negligence of the owner; holding valid tax titles on which the statute has fully run, except for defects going to the very jurisdiction.

To an owner who desires to pay, who is willing to bear the burdens as well as enjoy the benefits of ownership, the tax laws of Wisconsin are most liberal. But to one who abandons his ownership, pays no taxes, takes no possession, makes no improvements, takes no concern for the land except to watch for a possible rise in value through the enterprise of others, such laws are at least just if not indeed strict.

In no decided case have the policy and effect of statutes of limitation upon tax titles been better stated than by RYAN, C. J., in *Oconto Company v. Jerrard*, 46 Wis. 317, 324.

"*Interest reipublicæ ut sit finis litium.* It is therefore the policy of the law that some reasonable lapse of time should end all controversies; that unchallenged possession under color and claim of title, however defective, should ripen in time into title unchallengeable. This is the philosophy of statutes of limitation. They are, therefore, called statutes of repose. They give possession rest from litigation. When they have run they bar forever all previous rights against the title which they protect; silence forever all objections against it and all criticisms upon it. The claims which would have prevailed over it before become extinct. The defects which would have been fatal to it before are cured. Whatever could have been heard to impeach it before can be heard no more forever. So it is here. The respondents had their day to impeach the tax proceeding and avoid the tax deed. Then they might have said that the groundwork was so defective that there was no tax and that the deed was therefore no tax deed. This they did not then do, and they are now too late to do it. They suffered the statute to purge the tax proceedings of all defects, to raise the tax deed above impeachment. Their objections may be well founded, but they come out of time. What the respondents might have said, they cannot now say. The statute has left them like one estopped to speak the truth, because they did not speak it when they might.

"That has been the construction uniformly given by this court to the statute of limitations in relation to tax deeds. It has been uniformly held in a multitude of cases, that, as against the grantee of a tax deed, the statute puts at rest all objections against the validity of the tax proceeding, whether resting on mere irregularity or going to the groundwork of the tax. That statute makes a deed valid on its face *prima facie* evidence, as soon as executed, of the regularity of all the proceedings, from the assessment

of the lands, inclusive, to the execution of the deed. And the effect of all the decisions is, that when the statute has run in favor of the grantee, the deed becomes conclusive to the same extent. See *Edgerton v. Bird*, 6 Wis. 527, and the cases collected in the note of Vilas & Bryant; *Lawrence v. Kennedy*, 32 Wis. 281; *Wood v. Meyer*, 36 Wis. 308."

This has been the uniform rule.

"The deed was therefore presumptive evidence that all taxable property within the district was duly assessed. Such having been its effect during the time when the parties might rightfully litigate these questions, it would be very singular if that effect should cease, when, by lapse of time, the statute declares that they shall not longer dispute them, and when by delay they have permitted what was before a presumption to ripen into an absolute legal conclusion."

Knox v. Cleveland, 13 Wis. 245, 254, per Dixon, C. J.

"The general authority of the taxing officers and the liability of the land to taxation being conceded, all other questions are at an end. . . . Aside from these, all other matters must be considered as irregularities merely, of which opportunity for investigation has been lost."

Ibid.

"The statute put them all at rest or else none of them, and if none, then it was useless." "Its object was to protect those who, without it, had no protection."

Ibid.

"It has been uniformly held, in a multitude of cases, that as against the grantee in a tax deed, the statute puts at rest all objections against the validity of the tax proceeding."

Oconto Company v. Jerrard, 46 Wis. 317, 325.

"The statute [of limitations of Wisconsin] applies whenever there has been an actual attempt, however defective in detail, to carry out a proper exercise of the taxing power. As against the grantee in the tax deed the statute puts at rest all objections raised, after the time specified, against the validity of the tax proceeding, from and including the assessment of the land, to and including the execution of the deed. If the deed is valid on its face, and purports to convey the land on a sale for the non-payment of taxes, it is during the three years *prima facie* evidence of the regularity of the tax proceeding; and, after the statute has run in favor of the grantee, the deed becomes conclusive to the same extent."

Geekie v. Kirby Carpenter Co., 106 U. S. 379.

"The general authority of the taxing officers and the liability of the land to taxation having existed, there was no want of authority to put the taxing power in motion. That being so, the lapse of time establishes conclusively the validity of the tax and of the sale, as against the irregularity in question. There having been jurisdiction, all error was conclusively barred by the statute. This construction is that held by the supreme court

of Wisconsin in regard to this statute, in *Oconto Co. v. Jerrard*, 46 Wis. 317, and *Milledge v. Coleman*, 47 Wis. 184; and it is said, and correctly, in the latter case, that that is the view that has been uniformly taken of that statute by that court, and that to adopt a contrary view would disturb numerous titles. Such construction was, therefore, always a rule of property in respect to land in Wisconsin, and is one which this court will follow. *Suydam v. Williams*, 24 How. 427."

Geekie v. Kirby Carpenter Co., supra.

Mr. Justice Swayne, in speaking of the Wisconsin tax limitation statutes, said:

"Statutes of limitation are now regarded favorably in all courts of justice. They are statutes of repose. Usually they are founded on a wise and salutary policy, and promote the ends of justice."

Leffingwell v. Warren, 2 Black, 599, 606.

The legislature early adopted the policy of protecting tax titles by reasonable statutes of limitation, and has never departed from it.

Three-years statute: This was first enacted in 1844; was re-re-enacted in 1858, and as part of the general statute applying to tax titles in 1859.

Sec. 12, p. 22, Laws of 1844.
Sec. 123, ch. 15, R. S. 1849.
Sec. 135, ch. 18, R. S. 1858.
Sec. 32, ch. 22, Laws 1859.
Sec. 1187, S. & B. Ann. Stats. 1878.

Nine-months statute: This was enacted in 1878, and applies to a limited class of tax deeds upon taxes levied prior to March 25, 1878. Its operation is the same as the three-years statute.

Secs. 1210*d*, 1210*e*, S. & B. Ann. Stats. 1878.
Gilkey v. Cook, 60 Wis. 133.

Nine-months limitation in favor of void tax deeds: Enacted in 1885. Provides that if in actions to quiet title, ejectment, etc., in respect to *void* tax deeds, if it shall appear in proof that the original owner, or those claiming under him, have failed to pay the taxes for four years next preceding the recording of the tax deed, and the tax-title grantee, or those claiming under him, have paid the taxes for three years after such recording, then the original title shall be forever barred, unless suit is brought by the original owner within nine

months after the passage of the act; *provided*, that this act shall not be taken to limit any right of action in favor of the tax-title grantee.

Sec. 1189*a*, S. & B. Ann. Stat., vol. 1, p. 745.
Webster v. Schwears, 69 Wis. 89.

It was to support this limitation, pleaded in the bill, and to show laches and abandonment by Ray, the original owner, and Bardon, the grantee, that evidence was given by complainant as to payment and non-payment of taxes since 1859, and not with any intention not to insist on *all* statutes of limitation applicable to the case and relied on in the bill.

One-year limitation: By chapter 309, Laws of 1880 (sec. 1210*h*, S. & B. Ann. Stat.), it was provided that equitable suits to set aside tax sales or restrain the issue of tax deeds must be brought within one year from the date of the sale.

Three-years limitation in favor of tax deeds of swamp and overflowed lands: By chapter 296, Laws of 1883 (sec. 1034*a*, S. & B. Ann. Stat.), the general three-years statute is made applicable to deeds of these lands, contracted to be sold by counties, which were not theretofore taxable.

These limitations have been frequently and favorably applied in a long line of decisions, some of which are as follows:

Edgerton v. Bird, 6 Wis. 527.
Falkner v. Dorman, 7 Wis. 388.
Knox v. Cleveland, 13 Wis. 245.
Parish v. Eager, 15 Wis. 532.
Swain v. Comstock, 18 Wis. 463.
Hill v. Kricke, 11 Wis. 442.
Sprecher v. Wakeley, 11 Wis. 432.
Whitney v. Marshall, 17 Wis. 174.
Dean v. Early, 15 Wis. 100.
Gunnison v. Hoehne, 18 Wis. 268.
Lawrence v. Kenney, 32 Wis. 281.
Wood v. Meyer, 36 Wis. 308.
Lindsay v. Fay, 28 Wis. 177.
Smith v. Sherry, 54 Wis. 114, 122.
Milledge v. Coleman, 47 Wis. 184.
Oconto Company v. Jerrard, 46 Wis. 317.
Sherry v. Gilmore, 58 Wis. 324.
Haseltine v. Simpson, 58 Wis. 579.

McDonald v. Daniels, 58 Wis. 426.
Hiles v. La Flesh, 59 Wis. 465.
Urquhart v. Westcott, 65 Wis. 135.
Dupen v. Wetherby, 79 Wis. 206.
Hotson v. Wetherby, 60 N. W. Rep. (Wis.) 423.

In the United States courts the local decisions have been universally followed.

Leffingwell v. Warren, 2 Black. 599.
Coleman v. Peshtigo Lumber Co., 30 Fed. Rep. 317.
Geekie v. Kirby Carpenter Co., 106 U. S. 379.
Lewis v. Monson, 151 U. S. 549.

"No question is more clearly a matter of local law than one arising under the tax laws."

Lewis v. Monson, *supra*.

The general index and record book; original index, vol. 2.— All of these statutes of limitation commence to run from and after the *recording* of the tax deed. The question then is whether the tax deed of 1870 was properly recorded. What must be done to properly *record* a tax deed, or any deed (since the same rule applies to all deeds), is not, as we submit, a question at all unsettled in Wisconsin, but is fully put at rest by the following decisions. The deed is required to be indexed in the "general index" or "reception book," under the name of the county issuing the deed, under the proper letter (in this case under the letter D); and must be engrossed or spread at large on the record book of deeds kept for that purpose.

Shove v. Larson, 22 Wis. 142, A. D. 1867.
Hay v. Hill, 24 Wis. 235, A. D. 1869.
Oconto Company v. Jerrard, 46 Wis. 317, A. D. 1879.

At this point in the line of decision the complainant purchased the land in suit by deed dated June 13, 1883, for $6,400 actual cash paid. P. Rec. 172, 173.

Lombard v. Culbertson, 59 Wis. 433, A. D. 1884.
St. Croix, etc. Co. v. Ritchie, 73 Wis. 409, A. D. 1889.
Hall v. Baker, 74 Wis. 118, A. D. 1889.
Coleman v. Peshtigo Lumber Co., 30 Fed. Rep. 317.
Hotson v. Wetherby, 60 N. W. Rep. (Wis.) 423.

In *Shove v. Larson* it was held that a wrong description of land in the record book was cured by a correct description in the general index.

In *Hay v. Hill* there were two general indexes, but a correction made in one of these indexes was held to be too late to affect a *bona fide* purchaser.

In *Oconto Co. v. Jerrard* there was in the general index an entry to "see the record," in place of the description of land, and the indexing was held good.

In *Lombard v. Culbertson* there was no general index whatever, and it was held that the deed was not recorded.

In *St. Croix, etc. Co. v. Ritchie* the omission of the description of the land in the general index was held to have been cured by transcribing the deed in full in the record book containing the description.

In *Hall v. Baker* the entry in the index book, under the heading of "description of lands," was "see deed," and it was held good.

In the case of *Lander v. Bromley*, 79 Wis. 372, the deed was duly indexed and copied on the record. But the deed was void on its face for showing a sale in a place not authorized by law. No question of due recording was presented. The court says that the "proper entries" must be made in the general index, without saying what they are.

In *Hiles v. Atlee*, 80 Wis. 219, there was no general index whatever, and it was, of course, held that the deed was not recorded.

In *St. Croix, etc. Co. v. Ritchie, supra*, the court distinguishes and harmonizes *Shove v. Larson*, *Hay v. Hill*, *Lombard v. Culbertson* and *Oconto Company v. Jerrard*, and expressly follows and approves the latter case.

The rule of *Oconto Company v. Jerrard* and other cases has been enacted by the legislature, in ch. 323, Laws of 1887 (sec. 759[illegible]; 1 S. & B. Ann. Stat. 464). This act provides that an entry of "see record," "see deed," or "see mortgage" in the index column of the general index for description of land, shall be a sufficient reference to the record at large, if the instrument be in fact recorded at the place referred to in the index.

It appears, then, at least prior to this statute, that if the general index did not contain the description of the land at all (*St. Croix Co. v. Ritchie*), or simply contained the words "see

record," or "see deed" (*Oconto Co. v. Jerrard* and *Hall v. Baker*), the record is good and valid, if the land is correctly described in the transcription at length on the record book. Also that an erroneous description of the land in the record book is cured by a correct description in the general index (*Shove v. Larson*), and a correct description in the record book cures the omission of the description in the general index. *St. Croix Co. v. Ritchie.*

"Where, by some mistake, there is a discrepancy between the proper index entries and the instrument as registered, there each supplies the defects of the other in the constructive notice thereby given." A purchaser "is presumed to have examined the whole record."

Pringle v. Dunn, 37 Wis. 449, 462.

In the case at bar the deed was fully and accurately transcribed in the record book. But it is claimed that it was not indexed in the general index or record book. There are shown in proof two general indexes covering the period in question, one the original and the other a certified copy made by competent authority of law to replace the original, because of its being worn. In both of these indexes there are eleven columns (some of them double), and eleven entries. P. Rec. 166, 167. The law then in force provided for eight columns. One of the columns provided for by law is "Description of land." The two indexes in question make four parts of this column as follows: Description, Section, Town, Range. The following shows the method of entering the deed in both indexes:

No. of column.	Column Heading.	Entry in Column.
1	Date of filing	1870, September 7, 3 p. m.
2	Grantor	Douglas county, per clerk.
3	Grantee	Hayes, Hiram.
4	Instrument	Tax deed.
5	Description	Southeast ¼ (or ½).
6	Section	28.
7	Town	49.
8	Range	14.
9	Where recorded	Book 1 of Tax Deeds, pages 378, 379.
10	To whom delivered	H. Hayes.
11	Fee	1.

The only difficulty with the first or original index is that the fifth or "description of land" column is divided into four

parts, and the figures "28, 49, 14" are not under the proper sub-columns of the fifth column required by law, although they are all in such fifth column. In other words, the column arrangement provided by statute is fully complied with, but the sub-column arrangement made by the register of deeds is disregarded.

In the second index, or certified copy, the entries are accurate and clear.

By looking at the photograph of the original index it will be seen that while the entries there shown comport with the column arrangement, that is, that the fifth entry is the correct entry to be made for the fifth column heading, the sixth entry for the sixth heading, and so on to the end, yet the register by mistake commenced his entry too far to the right, became cramped for space, and carried the entries beyond the improvised unnecessary column arrangement.

Any other construction leads to the following absurd and absolutely impossible description: "South-East ¼ (or ½) of Town 28, Range 49, *Volume* 14." So absurd a description would at once excite attention and lead to further examination.

It will be further noticed that some of the lines in the description column are very faint, thus making it the less necessary to observe them. None of them being required by law to be made, it would seem that they might be disregarded.

There was no necessity to put anything whatever in the fifth column, but the register did put into it words and figures exhibiting the usual method of describing land by government survey. The meaning of "28, 49, 14" is as well understood in Douglas county as is "2:35" on the race-track, "24" for stock or "115" for bonds, on Wall street, or 12–20–94 for December 20, 1894.

If the entry is to be read "South-East ½" instead of ¼, well and good; for the southeast half of a section includes the southeast quarter of it.

A person of usual intelligence and diligence would not have the slightest trouble in understanding just what was meant by this index.

The court below well said:

"Taking the page as a whole, the judgment of the court is that any one who would be misled by it would be misled wil-

fully. Though the description of the land is not as full as would be made in a deed, any one not an expert in such matters, but at all accustomed to our usual method of describing lands, would read it correctly at first glance. Though the index is imperfect, there is nothing misleading about it, and it furnishes all the information that an ordinarily prudent man would want to send him to the full record of the deed. . . . This statute has received from time to time a very liberal, but to my mind just and proper, construction by the supreme court of this state, and those decisions are binding upon this court."

Land and River Imp. Co. v. Bardon, 45 Fed. Rep. 706, 710, 711.

The appellant would very much like to be "wilfully misled," in the language of the lower court, in order to get this valuable land, worth perhaps $100,000, for nothing — absolutely nothing.

Authorities as to general index.— The man who seeks to defeat the former owner's title by a three years' record of his tax deed is required to show that it was so recorded as to be constructive notice, at least to the plaintiff, that he held such tax title and intended to rely upon such deed to defeat the plaintiff's title. He must record it the same way to set the statute of limitations running in its favor and against the plaintiff, as he would be required to do in the case of a deed or mortgage to defeat the right of a subsequent purchaser for value without notice.

Lombard v. Culbertson, 59 Wis. 439.
Parker v. Kane, 4 Wis. 1.

"The statutory direction is substantially complied with by a certain reference to another book in the same office. No sane man searching the general index for instruments affecting any land would disregard such a reference. And it would be a severe technicality to avoid the registration of a deed for such a failure in duty of the register, with such present and easy means given on the face of the index of obtaining the information which the index itself should have given. The cruelty of such technicality would be apparent in the case of any instrument except a tax deed. And, as already seen, what can impair the registry of a tax deed impairs the registry of any deed."

Oconto Company v. Jerrard, 46 Wis. 322.

"If the index discloses enough to put a careful and prudent examiner on inquiry, and if, on such inquiry, the adverse title would have been ascertained, the party will be held to notice."

Jones v. Berkshire, 15 Iowa, 248, approved in *American Emigrant Co. v. Call*, 22 Fed. Rep. 767.

Where the legal title was in W. T. B., the wife, and the instrument was indexed under the name of W. H. B., the husband, held sufficient to put a purchaser on inquiry.

Jones v. Berkshire, 15 Iowa, 248.

Whenever the state of the title on record would lead a searcher of incumbrances, who was using common sense and prudence, to a knowledge of the fact, the law presumes he has acquired a knowledge of it.

Leiby v. Wolf, 10 Ohio, 84.

It is a well-established principle that whatever is notice enough to excite attention and put a party upon his guard and call for inquiry is notice of everything to which such inquiry might have led.

Carr v. Hilton, 1 Curtis (C. C.), 390, 391, quoting from *Kennedy v. Green*, 3 My. & K. 719, 721.

"N. ½ n. e. sec. 3, town 2, range 19," held good. *Sexton v. Appleyard*, 34 Wis. 240.

In *Jensen v. Weinlander*, 25 Wis. 477, a patent of school land was attacked on the ground that the notice of the sale named a certain day in "1761" as the day of sale. It was, of course, apparent that this was a mistake and that "1861" was intended, and it was sustained.

In *Merrick v. Wallace*, 19 Ill. 486, the land in question was s. e. ¼ sec. 34, township 34, range 3. Plaintiff claimed under a sheriff's deed of the land on execution against one Green, and defendant claimed under a deed from Green. Plaintiff, in order to defeat title under the deed from Green, attempted to show a defective record of it, and such a one as would not be notice, and it appeared that the description of the land in the record was "S. E. ¼ sec. *thirteen four*, T. 34, R. 3." The court say:

"Let it be granted that the deed was inaccurately recorded: the point we then make is, the record disclosed the fact that a deed for a tract of land with an impossible sectional number, in township thirty-four north, range

three east of the third principal meridian, was recorded, the names of the parties thereto distinctly appearing. Now, a party dealing with the grantor in such a deed would have his attention arrested by this singular description, and he would be naturally led to inquiry. The record afforded him abundant data, which, properly used, and diligently inquired into, would inevitably have led him to the fact of the existence of the deed."

In *Doyle v. Teas*, 2 Scam. 250, it is said:

"It is sufficient, if the channels which have led to the truth were open before him, and his attention so directed that they would have been seen by a man of ordinary prudence and caution, if he was liable to suffer the consequences of his ignorance. The law will not allow him to shut his eyes where his ignorance is to benefit himself at the expense of another, when he would have them open and inquiring had the consequences of his ignorance been detrimental to himself and advantageous to another."

Again the court, in *Merrick v. Wallace*, *supra*, say:

"Suppose the fact to be that Green had but one tract of land, the record would show that he had disposed of a tract, and as it has, as it now stands, an impossible sectional number, he would have been admonished, by this fact, of the necessity of further inquiry, which must have resulted in the fact that it was the very land Green did own, on which the judgment attached."

So in this case the taxes were a lien on the land, and the public is chargeable with notice of such lien. Following up the records it is found that the lands were returned as delinquent, and sold, and then follows a deed, just a few days after the three years were up, with an entry which shows the true description, or at least would naturally lead any one to stop and look farther. See sec. 1088, R. S. 1878.

Milwaukee Iron Co. v. Hubbard, 29 Wis. 51.

In *Sigourney v. Munn*, 7 Conn. 325, 333, a deed was made by Charles Sigourney to himself and Charles Munn, recited to be "merchants in trade under the firm name of Charles Sigourney & Co.," and the land released was "to be held in such proportion as is agreed upon between them." The question was whether a purchaser had constructive notice that the land was partnership property. The court say:

"This writing has a number of striking singularities calculated to arouse attention. It is a deed from Sigourney to himself and Munn, described as merchants in company, and as to himself it conveys no title. . . . The majority of the court is of the opinion that Holbrook, who must be presumed to have read this writing, could not fail to observe its peculiarities, to have his attention awakened and stimulated by them, and see the path that would conduct him to a full knowledge of the rights of the plaintiff."

Thorwarth v. Armstrong, 20 Minn. 464: Certain mortgaged premises were accurately described in the mortgage as lots 26 and 27, in McCloud's subdivision of block 2, in Vandenburgh's addition to Hoyt's addition to St. Paul. By mistake of the register the premises were described in the record of the mortgage as lots 26 and 27, in McCloud's subdivision of block 2, in Vandenburgh's subdivision of block 2, in Vandenburgh's addition to Hoyt's addition to St. Paul. There never was any subdivision of block 2 except McCloud's. Held that the false and impossible particular, added by mistake of the register, should be rejected in construing the record description.

In *Barney v. Littie*, 15 Iowa, 527, a mortgage was filed in the recorder's office and recorded on page 546 of the proper book. The index entry showed the names of the grantors and grantee, substantially the nature of the instrument and the book in which the mortgage was recorded, but stated that the record was on page 596. The time of filing was wholly omitted, also the date of the instrument and description of the lands conveyed, although required by law. The court held, *per* DILLON, J., that the office of an index "is to point out the book and page where the instrument is recorded. These are the essential uses and purposes of the index book, to facilitate the examination of titles." And also held that it is sufficient if the index points to the record with reasonable certainty. "The proposition is indisputable and clear, founded in reason and sanctioned by authority, that if an ordinary diligent search of the records will bring to the inquirer knowledge of the prior incumbrance or alienation, he is presumed to know it." 2 Wash. R. P. 596; *Flynt v. Arnold*, 2 Met. 619–625.

"It is a purchaser's duty to examine the records. The law places the means at his disposal. It requires all matters affecting titles to appear of record. If he has omitted to examine, he is to impute the loss, if any, to his own negligence or fault. Assuming the instrument to be one which was properly to be registered, the law charges him with knowledge of all the facts which an ordinary careful and prudent examination of the records would have made him cognizant of. Having thus settled the rule which is to be applied, the court cannot avoid the conclusion that if the appellants in the case under consid-ration had made an ordinarily diligent and skilful examination of the records, the mortgage in question would have been discovered by them. In the index they find the entry of the mortgage from their proposed grantor to Mason purporting to be recorded on page 596.

Turning to that page they find indeed a mortgage to Mason, but from a different grantor. On reading that mortgage it would be seen that it conveyed different lands from those which their grantor proposed to sell. This would, and should, provoke a careful scrutiny. The index would be again referred to; it would be found that the next preceding entry is of a mortgage to the same grantee on page 527, while the next succeeding entry is of a mortgage to the same grantee on page 582. It would be found that page 596 is placed between 527 and 582, while all the other figures in the whole index under the letter L descend in regular numerical order from top to bottom of the page. To a competent examiner it would occur that it was much more likely that the recorder should mistake a figure than the name of a party. Between the two pages last above named, namely on page 546, the mortgage referred to by the index would have been found duly acknowledged and regularly recorded in its proper place and order."

Ibid.

In *Partridge v. Smith*, 2 Biss. 183, one Alice B. Smith, on October 9, 1867, executed a mortgage to complainants of the south half southeast quarter sec. 15, T. 8, R. 43 East, McHenry county, Illinois. On October 1 she had executed a trust deed to W. C. Goudy of the same premises, but which was not recorded until October 16. There was a mistake in the description of land in the mortgage. It should have been the S. E. Sec. 15, T. 43, R. 8; and the question was whether it was sufficient on being recorded to put a purchaser upon inquiry, and whether it was paramount or prior to the trust deed to Mr. Goudy.

DRUMMOND, J.: "It would be known, of course, at once, to any person familiar with the government surveys, of which the court takes judicial notice, that there is no such tract of land in McHenry county as the one described in the mortgage. . . . Of course if the mortgage to the plaintiffs had duly described the land and there was no notice to plaintiffs of the prior deed of trust, the registry laws would place the question beyond controversy; but the misdescription of the land in the mortgage gives rise to the controversy. . . . As between these parties, I understand the law to be that the mortgage and deed of trust take effect from the time they are filed for record. As already stated, the defendants concede this, if the property had been truly described in the mortgage, and admit that if the mortgagees had no notice of the prior deed of trust the mortgage would be prior in point of law to the deed of trust. Then these two instruments, having taken effect from the time they were filed for record, when the deed of trust took effect on the 16th day of October, what was the condition of the property? There was a mortgage upon the record or filed for record, which is the same thing, two days before, by Mrs. Smith to the plaintiffs of a tract of land in McHenry county, described as the south half of the southeast quarter of section 15, town 8 north, range 43 east, and the savings bank and Mr. Goudy are presumed to know the fact. With this

knowledge, the question is whether there was not upon the record enough to put a prudent man upon inquiry in order to determine whether Mrs. Smith had not previously mortgaged her property covered by the deed of trust; and I think there was.

"It may be admitted — and I think the authorities go that far -- that if there had been any land in McHenry county to which this description would apply, it would not be the duty of the parties to trace it up and determine what the actual truth was; but upon a mere inspection of the record, which these parties are presumed to have seen, it would appear that Mrs. Smith undertook to mortgage a particular tract of land in McHenry county; that it was east of the fourth principal meridian; that it was in town 8, north; that it was in range 43, east. The inquiry would naturally be, what does this mean? There is no fourth meridian in McHenry county; there is no range 43, east. In point of fact the range and town are simply transposed. I think that with this before them there were facts from which they could infer, or any prudent man might infer, that this property upon which their deed of trust operated was incumbered and that incumbrance was upon the record two days before their own. The property was actually mortgaged. It was the intention of the parties that it should be mortgaged. There is simply a misdescription of the property. The question is whether it is of such a character as to do away with the effect of the registry laws against a person whose deed took effect subsequent to the recording of the mortgage. I think there is enough upon the record to put a prudent man upon inquiry and compel him to follow it up and to affect him with the consequences of that pursuit."

It would certainly seem that this index should be held good against the appellant, who has only "family interest" invested in this land. Family interest does not pay taxes, or purchase money, nor does it build towns.

Vacant and unoccupied.— Both bill and answer allege that the land was vacant and unoccupied more than three years from the time of the record of the tax deed. P. Rec. 3, 7.

It would be so presumed without such allegations.

Gunnison v. Hoehne, 18 Wis. 268.
Lawrence v. Kenney, 32 Wis. 281.

This presumption is founded on the statute making the deed *prima facie* evidence of the regularity of the proceedings, and declaring that it shall convey an absolute estate in fee; necessarily it must carry the constructive possession to the grantee.

Counsel argue, indeed, that tax deeds were not, prior to 1878, *prima facie* evidence of regularity, and say that the question has never been before the court of Wisconsin. In *Lawrence v. Kenney*, *supra*, the court say that the tax deed is

provided by statute to be "*prima facie* evidence of the regularity of all the proceedings from the valuation of the land by the assessor, *inclusive*, up to the execution of the deed," and that the deed is "presumed in law to be in all respects valid and regular."

Many decisions, all based on the *prima facie* character of the deed, have held that constructive possession of vacant land follows the record of a tax deed fair on its face. Most of those already cited so hold.

Oconto Company v. Jerrard, 46 Wis. 317.
Milledge v. Coleman, 47 Wis. 184.

"The deeds are themselves *prima facie* evidence of regularity."

Whitney v. Marshall, 17 Wis. 174.
Geekie v. Kirby Carpenter Co., 106 U. S. 379.
Jarvis v. Sullivan, 21 Wis. 600.
Marshall v. Benson, 48 Wis. 558.

The certified copy of the general index.— As before stated, the entries in the book known as the copy of general index No. 2 are perfectly made, subject to no criticism whatever. The defects in the original index are fully and clearly corrected. This copy was used in place of the original from about the time it was made, in 1875, the original being kept in the vault, and the copy laid out on the table or counter. P. Rec. 88. The copy was made under chapter 201, Laws of 1860, and chapter 284, Laws of 1875, authorizing the county board of supervisors to replace worn or dilapidated records. Section 3 of the act of 1875 provides as follows:

"The copy so made shall have the same effect as the original, and be evidence in all cases where such original would be evidence, and shall be in its legal effect in all respects considered as an original record in such office."

The county board of supervisors of Douglas county, by resolutions of May 28, 1872, and July 2, 1873, authorized this copy to be made. Although the law of 1875 had not been passed when the resolutions were adopted, yet the copy was not completed until November 9, 1875, some months after the act of 1875 was passed. P. Rec. 85–87.

Our contention in respect to this copy is that although the law under which it was made provides that it shall have the same effect as the original, yet this does not mean that it shall have exactly the same effect, as to each particular entry, as the original, but was intended to make it fully as good and effective as the original, and that the register in making it had power to correct any mistake in it. In other words, that the register of deeds had the same power to correct mistakes in the copy as in the original, as it is by law given the same effect.

That the register of deeds may correct a record of his own motion is fully settled.

Lombard v. Culbertson, 59 Wis. 433, 441.
Hotson v. Wetherby, 60 N. W. Rep. 423 (Wis.).
Devlin on Deeds, sec. 698.
Chamberlain v. Bell, 7 Cal. 292.
Baldwin v. Marshall, 2 Humph. 116.
Sellers v. Sellers, 98 N. C. 13, 18.

"It is well settled that an omission to make proper entries in the general index at the time the deed is spread upon the record may be removed after such recording by making the proper entries, and when so made the entry will be good from that date, and it will not be necessary to again record the deed at length."

Hotson v. Wetherby, supra.

It would seem quite clear that the *first index* was good, especially as against an original owner and his grantees who have never, during the thirty-five years of their alleged ownership, paid a tax, laid out a cent in improvement, or done a single act of ownership. Certainly the *copy* is good to all practical and reasonable intents. It is clear and correct, and has been in general use since it was made. The defendant has no money invested in this land — not a dollar; yet he wishes the court to strain a point in order to defeat a tax title which represents all of the *bona fide* ownership and possession the land has ever known.

II.

The Tax Deed of 1870 was Fair on Its Face.

An objection is made which seems the very extreme of technicality and absurdity, to the effect that the tax deed contains a certificate both that the owner or owners "has" redeemed the lands which were sold, and that the owner or owners "have not" so redeemed them.

The statutory form, in this connection, is as follows:

"And whereas, it further appears, as the fact is, that the owner (or owners) or claimant (or claimants) of said lands has (or have) not redeemed from said sale the land which were sold," etc. See Appellant's Brief, p. 13.

The deed itself is in exactly the statutory form, leaving out the parentheses. Now, we know what the statutory form means. Its object is to have grammatical expressions, in providing for the case of a single owner and more than one. It aims to say, "Whereas, the owner or claimant *has* not redeemed," or, "Whereas, the owners or claimants *have* not redeemed." And the deed says the same thing, *for it uses precisely the same words.* Counsel's argument is this: A statutory form, in certain words, means *one* thing, and a deed in precisely the same words means a totally different thing; and they carry the absurdity still further (if possible) by asserting that the deed means both the same thing as the form, and also something directly opposite.

The perfectly evident meaning of the deed is that the owner or claimant has, or the owners or claimants have, not redeemed the land. The other construction makes the deed read thus: The owner or owners or claimant or claimants *has* redeemed, or the owner or owners or claimant or claimants *have not* redeemed. Counsel say this is grammatical; that is, it is highly grammatical to use a singular verb as the predicate of a plural noun.

Webster classes *not* as an adverb, that is, "a word used to modify the sense of a verb, adjective, participle or other adverb, and usually placed near it." *Redeemed* being the principal verb, and *has* and *have* auxiliaries, it is reasonable to say that *not* modifies the sense of redeemed, making it negative, or "not-redeemed," or "redeemed not." Suppose we put the

word *not* after the verb: The owner or owners or claimant or claimants has or have redeemed-not the lands. All ambiguity (if there were any) vanishes.

We really feel like apologizing to the court for saying so much about this small objection. But it is like some small difficulties in the physical world, the difficulty of dealing with which is in inverse ratio to their size and apparent significance.

III.

The Taxing Officers Had Jurisdiction.

Our contention is, first, that the resolution of 1861 vacating the towns of Pokegama and Nemadji in effect attached their territory to the town of Superior; and second, that the exercise of jurisdiction over their territory from 1861 to 1866 by the officers of the town of Superior, *with the consent of the people*, is such user as to cure the irregularity, if any.

It appears that in 1859 two towns were set off by the county board of supervisors,—town 48, range 14, to be known as Nemadji, and town 49, range 14, as Pokegama. On January 19, 1861, a resolution was passed by the county board as follows:

> "That the towns of Pokegama and Nemadji be vacated, the above order to take effect and be in force on and after the first day of April next; and the board do further order and determine that the next town meeting shall be held in the town of Superior to elect three supervisors that shall be the county and town board of supervisors." P. Rec. 80, 83.

Now while this language does not fully express the idea that the territory is to be attached to the town of Superior, yet substantially that is what it means. The resolution provides that the towns shall be vacated, that the next town meeting for the election of town officers *for their territory* shall be held in the town of Superior, and that the board of supervisors so elected shall be both the county board and town board; that is, that thereafter the *county of Douglas* and *town of Superior* shall be composed of the same territory. What is this but another way of saying that the territory of these two towns shall be part of the town of Superior? The resolution clearly provides for the government of the territory in question. The town meeting, which is the primary assembly of the town, is to be held in the town of Superior, and at such town meeting all business relating to the whole

county, in its character as a town, would be transacted. Accordingly we find that the town meeting was held in the town of Superior April 2, 1861, at which were elected a county judge, chairman of town board, two other supervisors, members of the board, town clerk, assessor, school superintendent, justices of the peace, constable, overseer of highways and sealer of weights and measures. P. Rec. 96, 99.

On April 10, 1861, the first meeting of the new town board was held, at which the clerk "of the late town of Nemadji" was asked to hand over to the clerk of the town of Superior all books and papers appertaining to his office. A petition to build a wagon road from *Connor's Point* was received. Connor's Point was in the late town of Pokegama, as appears on the next page of the record. P. Rec. 100, 101.

The town board adjourned to April 15, 1861, when it "proceeded to examine the books and accounts of the late town of Pokegama, after which they were accepted and filed in the office." P. Rec. 100.

From this time on up to December 26, 1866 (when the record closes), the town of Superior, through its board elected by the inhabitants of the whole county, including, of course, town 49, range 14, in pursuance of the resolution of the county board of January 19, 1861, *with the full consent of the people*, continued to exercise the fullest jurisdiction over this territory, by building and vacating roads, levying taxes, auditing accounts, canceling orders of "the late towns of Nemadji and Pokegama," and paying bounties to volunteers in the service of the United States "from Douglas county." See the town record at large, pages 96–163.

On June 12, 1865, the town board of Superior, elected by the people of the whole county, resolved

"That the town of Superior, which includes the county of Douglas, be and hereby is divided into three school districts." P. Rec. 144.

These districts are bounded on page 147, and include all of town 49, range 14.

Counsel argue that by the resolution of January 19, 1861, nothing whatever was done with the territory in town 49, range 14, and that an attempt was made to deprive the inhabitants of such territory of their right of suffrage. Brief, p. 42. It seems, however, that the inhabitants of that territory

did not so understand it, inasmuch as they immediately took part in the election of town officers, and submitted willingly to the jurisdiction of their own representatives, whom they had elected, from that time onward.

After the case of *Smith v. Sherry*, 54 Wis. 114, was decided, avoiding certain tax deeds upon taxes levied in a town not regularly organized, the legislature amended section 674 of the Revised Statutes by providing as follows:

"Every town shall be considered and held to be, and to have been, duly organized, which has exercised, or shall hereafter exercise, the powers, functions and franchises of a town for a period of two years. The validity of any order, ordinance or proceeding, purporting to organize or set off any new town, or change the boundaries of any existing town or towns, may be tested by *certiorari* or any other proceeding brought directly for the purpose of vacating such order, ordinance or proceeding by a proper officer or by any person owning taxable property in any town purporting to be so organized, set off, enlarged or diminished, at any time within two years after the date of such order, ordinance or proceeding, or within sixty days after the publication of this act, in cases wherein the two years above limited shall have expired prior thereto, or shall expire during said sixty days, and not thereafter. No such order, ordinance or proceeding shall in any wise be called into question in any action or proceeding, except one brought directly for that purpose within the time above limited, and except in a case wherein such order, ordinance or proceeding shall have been vacated by a court of competent jurisdiction."

S. & B. Ann. Stat., sec. 674.

The supreme court in several cases, and the federal court in this state in one case, have held that under this section two years' user by a town, *de facto*, shuts the door to any inquiry as to its organization, and that the act is valid.

"The statute expressly provides that the validity of any ordinance purporting to organize or set off any new town, or to change the boundaries of any existing town or towns, may be tested by *certiorari*, brought directly for the purpose of vacating such ordinance, in a court of competent jurisdiction. This statute has been repeatedly recognized as an existing law by this court. *Sherry v. Gilmore*, 58 Wis. 332; *Schriber v. Langlade Co.*, 66 Wis. 625. It has also been so recognized by the United States court for this district. *Austrian v. Guy*, 21 Fed. Rep. 508."

State ex rel. v. Forest County, 74 Wis. 610.

Counsel argue that this statute has no reference to orders vacating towns. What we contend for is simply that the order of January 19, 1861, in an informal and defective way, provided that the territory in the two vacated towns should be

governed by, and be in effect attached to, the town of Superior, and that town from that time onward, with the full consent of all the inhabitants of the county, exercised jurisdiction over the territory lately belonging to such towns. This fully appears in the town records, and need not be repeated here.

IV.

The Argument of Appellant as to Waiver of the Statute of Limitations.

The argument is made constantly in the brief for the appellant that the appellee has, by introducing certain evidence, waived its right to rely upon the statute of limitations, which has long ago run upon its tax deeds. Thus, it is said that when the complainant introduced in evidence the record of the town of Superior from April, 1861, to December, 1866, for the purpose of rebutting evidence already introduced by the appellant, to the effect that town 49, range 14, had been set off and constituted the town of Pokegama (P. Rec. 80), the appellee could not introduce in evidence a record of the town of Superior to show that that town, with the consent of the inhabitants of the county, exercised jurisdiction over such territory, except at the peril of destroying its plea of the statute of limitations upon its tax deeds, if by any chance there was anything in the record of the town proceedings which showed some informal or irregular action in the proceedings leading up to the tax deeds. Of course the evidence introduced by appellant, showing that the land in 1861 was not in the town of Superior, would tend to show that the taxing officers of that town had no jurisdiction, and that the statute of limitations of three years would not cure this defect. Now, says counsel for appellant, you cannot introduce any evidence to rebut this showing of want of jurisdiction on our part, except at the peril of waiving and destroying your claim that the statute has run. See Appellant's Brief, pages 37, 38.

To illustrate further: The tax deed of 1870 shows that it was executed on the part of the county clerk by D. C. Relf, deputy. P. Rec. 42. Defendant introduced a paper showing that Thompson Ritchie had been made deputy clerk by appointment January 4, 1869. P. Rec. 78. Now, to

rebut this evidence, the complainant offered in evidence a revocation of the appointment of Thompson Ritchie, dated June 12, 1869, and in the same paper an appointment of D. C. Relf as deputy clerk. P. Rec. 84. Now, argue the counsel, the complainant has thus contradicted its own testimony, and complainant's tax deed is therefore void, and it is estopped by its own proofs, thus showing the invalidity of this tax deed.

It is very difficult to understand this argument, although it seems to be based upon a misconception as to the manner in which the evidence was introduced.

A further illustration of the claim of the appellant, that the complainant has waived the conclusive effect of its tax deeds, comes from the erroneous assertion on the part of counsel that complainant offered evidence to show *all* tax proceedings against the lands in question. This is asserted on page 79. What the complainant did offer and seek to prove was that the original owner, Ray, and his grantees, James Bardon and Thomas Bardon, had abandoned this land at an early day; had never paid any taxes upon it; never exercised any of the acts or borne any of the burdens of ownership, and had no money whatever invested in the lands. To show this in part, complainant offered in evidence not a copy of "all tax proceedings" as claimed by counsel, but "a transcript of the tax rolls, delinquent rolls and certificate books" relating to the land in question. P. Rec. 189, 177–188. To the same effect complainant proved by Mr. Wemyss, manager of the complainant company, that it had laid out a large amount of money for improvements in the vicinity of this land, thus enhancing its value. P. Rec. 56-60. It also proved by James Bardon that he paid James D. Ray, when he bought the land of him, "As near as I can remember, about $100; perhaps more;" and that the conveyance to his brother, the appellee, was a matter of family arrangement, there being no valuable consideration. P. Rec. 62. Thus, it seems to be thought that the complainant has waived the conclusive effect of its tax deeds by offering perfectly legitimate evidence to rebut evidence offered by appellant, and to show laches and abandonment on the part of the appellant and his grantors, and that in an equity suit where complainant ought to show what equities it has.

In support of the novel and evasive contention of waiver

counsel cites cases where the *prima facie*, not conclusive, effect of conveyances has been lost by proof on the part of those claiming under them to the effect that they were void, claiming that complainant relies merely upon a "statutory presumption," and not on the doctrine that statutes of limitation absolutely destroy the right and the remedy, and vest the title in the tax claimant. We find no fault with those decisions. But the running of the statute of limitations does not merely affect the rule of evidence, making the tax deed conclusive, but wholly destroys the adverse claim. In the language of MR. JUSTICE SWAYNE, in *Leffingwell v. Warren*, 2 Black, 599, 605, speaking of the effect of the identical statute of Wisconsin now under consideration, the statute extinguishes the right, as well as the remedy. He says:

> "The lapse of time limited by such statutes not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder."

Campbell v. Holt, 115 U. S. 620.
Knox v. Cleveland, 13 Wis. 245.

Waiver is a question of intent. It would seem to need little argument to show that parties litigant, carefully contending for their rights in contested cases, involving large sums of money, do not, by giving evidence deemed to be in support of their claims, intend to waive other claims of title, or the contentions they are then and there engaged in making in respect to them. Much less would it seem that they intend to waive not merely rules of evidence in their favor, but to actually abandon and surrender the title to land for which they are earnestly contending. It strikes one as rather extraordinary that by giving evidence in support of equities in complainant's favor, incidentally showing formal but not substantial defects in the tax proceedings, it should be thought to have surrendered and abandoned this land, the title to which has been perfect under the statute of limitations since September 7, 1873 — more than twenty years.

V.

The Limitation of 1885 on Void Tax Deeds.

This important statute shows the liberality of the policy settled in Wisconsin in favor of tax deeds when they represent the real, ostensible title and ownership. If the original owner pays no taxes for seven years, and the tax-owner pays the taxes for four years out of the seven, this is pretty good evidence that the original owner is negligent, and that the right of the tax-title claimant ought to be encouraged.

Upon this theory chapter 133 of the laws of 1885 was enacted. It provides that if it shall appear in proof in actions to quiet title, ejectment, etc., based upon tax deeds *purporting* to convey lands (that is, void deeds), that the original owner failed and neglected to pay the taxes for four years prior to the record of the tax deed, and the tax-owner has paid the taxes for three years after such record, then the title of the original owner shall be forever barred, unless he brings suit within nine months after the passage and publication of such act.

Sec. 1189*a*, S. & B. Ann. Stats.

This act applies only to void tax deeds.

Webster v. Schwears, 69 Wis. 89.

Prior to the passage of this act several tax deeds void on their face had been sustained by the supreme court of Wisconsin and the supreme court of the United States, on the ground that such deeds were coupled with the actual possession for three years.

In *Edgerton v. Bird*, 6 Wis. 527, the grantee in a tax deed void on its face took actual possession at once upon its execution, and held possession fifteen years. His title was sustained as well under the three-years tax-title limitation as under the ten-years limitation by color of title.

In *Sprecher v. Wakeley*, 11 Wis. 433, the tax deed was void on its face, but the grantee took actual possession more than three years after the recording of the deed, and held possession for more than three years. It was held that this made him the absolute owner of the land.

In *Lindsay v. Fay*, 25 Wis. 460, the same ruling is reaffirmed, and pronounced settled; the reason of the decision being that the *actual* possession under a void deed is equivalent to *constructive* possession carried by a valid one.

Warren v. Putnam, 63 Wis. 410.
McMillan v. Wehle, 55 Wis. 685.

In *Leffingwell v. Warren*, 2 Black, 599, the grantee in the tax deed took immediate possession and held it for twelve years. Although the taxes were paid, the tax title was sustained.

In this condition of the law the act of 1885 was passed. It will be seen that *there was and is no statute of limitations against a void tax deed* where the land is unoccupied. It was therefore competent for the legislature to enact a limitation *in favor* of void tax deeds, at least so far as vacant lands are concerned. This it did in the nine-months limitation act just mentioned.

Now the complainant, as a matter of prudence and safety, in its bill pleaded and relied upon this statute, and now insists that, if its deed of 1870 is for any reason void, this limitation bars the title of the appellant. For the purpose of sustaining this plea, and not to waive the three-years statute, the tax records were put in, as well as to show the equity of complainant, by showing that the original owners paid no taxes.

The proof on this subject is as follows:

For 1866 the taxes were unpaid. P. Rec. 179. The tax deed was based upon their non-payment.

For 1867 they were paid by H. Hayes. P. Rec. 30, 34.

For 1868 they were paid by H. Hayes. P. Rec. 30, 34.

For 1869 they were redeemed by H. Hayes. P. Rec. 30, 35, 182.

For 1870 they were paid by H. Hayes. P. Rec. 30, 35, 181.

For 1871 they were paid by H. Hayes. P. Rec. 31, 35, 182.

For 1872 they were paid by H. Hayes. P. Rec. 31, 35, 182.

For 1873 they were paid by H. Hayes. P. Rec. 31, 36, 183.

This proof shows absolutely that the case is within the nine-months limitation of the act of 1885, and fully protected by it if, by any possibility, it shall be thought that the tax deed of 1870 is void on its face.

In regard to the tax deed of 1882, like payment of taxes appears:

For 1876 the tax was levied upon which the tax deed was issued. The taxes were unpaid.

For 1877 they were redeemed by H. Hayes. P. Rec. 33, 50, 184.

For 1878 they were redeemed by H. Hayes. P. Rec. 33, 51, 184.

For 1879 they were redeemed by H. Hayes. P. Rec. 33, 51, 184.

For 1880 they were paid by H. Hayes. P. Rec. 33, 52, 185.

For 1881 they were redeemed by complainant. P. Rec. 186.

For 1882 they were paid by H. Hayes. P. Rec. 33, 52, 186.

For 1883 they were paid by H. Hayes. P. Rec. 52, 187.

For 1884 they were paid by complainant. P. Rec. 53, 187.

For 1885 they were paid by complainant. P. Rec. 53, 187.

They were also paid from 1885 down to the filing of the bill. P. Rec. 53–55, 188.

If we shall be unable, therefore, to overcome the grammatical technicality relied on by defendant as to the first deed, we hope that the considerations here presented may have some weight.

VI.

The Tax Deed of 1882.

Objections are made to this deed that the taxes were paid, and that the record is void because the words *section*, *town* and *range* were omitted from the columns in the record. Also that it shows on its face a sale of several parcels in gross.

The description.— The description was as follows: Southeast quarter 28, 49, 14, 160. Total amount, $8.94.

It is the common speech, the vernacular idiom. We say a piece of land is S E. S W. 10, 47, 13, for instance. We say it and write it in every-day language, and no one fails to understand just what is meant by the expression, and to know where the land is and what it is.

The following description was held good: N ½ n. e. sec. 3, town 2, range 19.

Sexton v. Applegard, 34 Wis. 240.

"'Ne' is an abbreviation of 'northeast,' in constant and universal use. There is no northeast portion of a section known in government surveys other than the northeast quarter of the section."

Ibid.

The description of each piece in the deed in question winds up with figures denoting the precise number of acres corresponding to the description, and agreeing exactly with the government survey in each case. How can any one fail to identify the land in this deed?

Taken with the tax certificate referred to in the margin of the record, the description is complete for all purposes of a tax deed or any other deed. The descriptions as matter of fact in certificate No. 325 are perfect, to which certificate unmistakable reference is made in the record of the deed.

Reinhart v. Oconto Co., 69 Wis. 352.
Ritchie v. Catlin, 86 Wis. 109.
Meade v. Gilfoyle, 64 Wis. 18.
Whitney v. Gunderson, 31 Wis. 359.

It is lands in Douglas county that are conveyed. They were sold for taxes, and bid in by and sold to Douglas county. Douglas county had no right to bid off lands not within the county. It is stated also, that the sums were due for taxes of a certain year. Here are references which might well call attention to matters of record, which would go far toward removing the ambiguity, if any, in matter of description in said deed.

Reinhart v. Oconto Co., supra.

The omission of the dollar-mark in tax proceedings occasions no ambiguity. Figures in the proper place are perfectly understood without that mark to mean dollars.

Whittaker v. Janesville, 33 Wis. 91.
See, also, *The N. W. Iron Co. v. Meade*, 21 Wis. 474.
Richelieu Hotel Co. v. International Military Encampment Co., 33 Am. St. Rep. 234, and note.

In the *Reinhart* case the action was to recover money paid for certificates alleged to be invalid on the ground of uncertainty of description.

In *Ritchie v. Catlin* the action was ejectment. *Meade v. Gilfoyle* was also ejectment, as well as *Whitney v. Gunderson.*

The descriptions in these cases, aided by extrinsic evidence, were considered good in tax deeds, and the deeds were held good on their face.

The court say: "Proof of the identity of the subject-matter, and anything connected with the instrument, or accompanying it, or referred to in it, such as dates, places, or persons, or parol evidence to explain the accepted meaning of these terms, or how they were commonly understood, may be resorted to, to make the description perfect or understood. These rules are sanctioned by the authorities of this and other courts."

Reinhart v. Oconto Co., 69 Wis. 355.
Keller v. Keller, 80 Wis. 318.

Were the taxes of 1876 redeemed?— Counsel argue that because Col. Hayes rendered legal services for Douglas county, and was paid by assigning to him the certificate on which the deed of 1882 was issued, this amounted to a redemption of the tax. It is the same as though Col. Hayes had paid the money for the assignment. The tax deed recites that the certificate was assigned to Hayes, and the copy of the certificate itself shows it. P. Rec. 42, 79. Nothing was redeemed or marked as redeemed.

Was the deed of 1882 void because it shows a sale in gross?— Counsel rely on *Tucker v. Whittlesey*, 74 Wis. 74. That case is not clear, but the point has been settled in favor of another Douglas county tax deed just like this one, in the case of *Hotson v. Wetherby*, 60 N. W. Rep. 423.

VII.

The Question of Jurisdiction and the General Statute of Limitations.

This is a bill to quiet title, brought under section 3186 of the Revised Statutes of Wisconsin, the complainant being in possession, and having no adequate remedy at law. The federal courts will give effect to such a statute.

Holland v. Challen, 113 U. S. 15.
Chapman v. Brewer, 114 U. S. 171.
Reynolds v. Crawfordsville Bank, 112 U. S. 411.
United States v. Wilson, 118 U. S. 89.

It is argued that this is a special statutory action under section 1197 of the Revised Statutes, which can only be brought within three years after the date of the tax deed, and that section 3186 does not apply to tax titles on which the statute has run. This objection is so evidently without foundation that we simply say that section 3186 provides that *any* person having the possession and legal title may sue, including, of course, a tax title, declared by law to convey an absolute estate in fee. See the reasoning of the supreme court of Wisconsin as to special remedies not excluding general, in *Pierce v. Milwaukee Construction Co.*, 38 Wis. 253, and defining the words "any corporation."

But it is further objected, the complainant's grantor might have brought this suit as early as 1877, when defendant got title. When did he set up a claim? He paid no attention to the land, asserted no title, and kindly permitted the complainant to pay all the taxes. Instead of setting up any claim to the land, he laid by, seeing the complainant make large improvements on other lands near these, seeing them rapidly rise in value. About the time this suit was begun he claimed to own the land. The bill so alleges, and the answer claims ownership in fee in defendant. P. Rec. 4, 7, 14. The bill was filed November 1, 1889. On June 30, 1890, defendant commenced an ejectment suit against complainant for the land in question, proceedings in which were enjoined by the circuit court. P. Rec. 15, 22, 23. The injunction was continued by stipulation of the parties. P. Rec. 23.

Complainant took possession of the land October 13, ~~1890.~~ 1889. P. Rec. 39, 40.

It will be seen that complainant had no cause of action for quieting title until it took possession, nor, it would seem, until some claim of title was made under the quitclaim deed to the defendant.

VIII.

Miscellaneous Objections to the Tax Deeds.

The custody of the tax records.— The learning on this head pertains to *ancient* deeds or other documents, and is collected in Wharton on Evidence, sections 194–197:

> "Is the actual custody so reasonably and probably to be accounted for that it impresses the mind with the conviction that the instrument found in such custody is genuine? That is the question."
>
> *Ibid.*, sec. 196, and note.

The cases in Wharton show that documents of a public nature were admitted in evidence often, when the custody had been in the hands of a private party, even.

The statute does not say where the tax books shall finally remain. The county treasurer collects on the delinquent list what he can, and sells the land for the rest. After that he has no need of the books. But the county clerk, the rightful and lawful custodian of the county records, is required to make constant reference to the books. The clerk executes the tax deeds. Suppose the tax is claimed to have been paid. The delinquent tax list should be at his elbow in his own office, to show the payment if made. If the tax has been paid, the clerk will cancel the sale and make no deed. So, also, with the town and city tax rolls. They should, for like reason, be with the county clerk.

For convenience of reference, it is infinitely better for the public that the tax records should be in one office, and that the county clerk's.

If there is any error in such custody, *Communis error facit legem.* The supreme court of Wisconsin found no difficulty in sustaining two Douglas county tax deeds, with the records in the same custody.

Dupen v. Wetherby, 79 Wis. 205.
Hotson v. Wetherby, 60 N. W. Rep. 423.

Take the case of redemption, the amount for which sale was made, and all *subsequent charges* must be paid.

Secs. 18, 19, ch. 22, Laws 1859.
Sec. 1165, R. S. 1878.

The clerk must have the books to know what shall be paid, so as to make an effectual redemption. Erroneous and defective descriptions have to be continually dealt with in the county clerk's office, or by the county board, and all the books are needed *there* for that purpose.

Sec. 28, ch. 22, Laws 1859.

The statute provided that the county treasurer should, immediately after the tax sale, deposit in the office of the county clerk "all affidavits, notices and papers relating to such tax sale to be filed and preserved therein;" also a statement of the particulars of the sale.

Sec. 15, ch. 22, Laws 1859, now sec. 1141, R. S. 1878.

This statute has been by the county officers of Douglas county construed to include the delinquent return and tax roll.

Appellant proved that there was no assessment roll of *1866* in the treasurer's office. A very good reason for this is that *none was required except in the odd-numbered years.*

Sec. 18, ch. 167, Laws 1859.

This section provides as follows:

"It shall be the duty of the assessors elected for the year 1859, and every *second* year thereafter, to list and value all the real property of this state . . . in the manner provided by this act."

This section was re-enacted by section 18, chapter 386, Laws 1860, and remained in force until the whole subject of the assessment of taxes was revised by chapter 130, Laws of 1868; section 14 of which act provided for the *annual* assessment of taxes.

Counsel did not call for the assessment roll of 1865, the odd-numbered year. Besides, the *tax roll* of 1866 (called the "assessment roll," shown in the record on page 179) shows that the land was assessed at $300. This is a *tax roll*, because it shows the *extension* of the tax.

The deputy county clerk is not a county officer.—The deputy is not required to give bond, but is required to take the oath of office.

1 Taylor's Stat., p. 307, sec. 81.
Ibid., p. 336, sec. 223.

The clerk and his sureties are responsible for the acts of the deputy.

Taylor's Stat., p. 307, sec. 81.

The law (1 Tay. Stat. p. 336, sec. 222) requires every *county officer*, within a specified time, "to deposit his *official bond*, as prescribed by law." But the law never required a deputy clerk to give bond. The clerk and his sureties are responsible under *their* official bond for the acts of the deputy. Therefore the deputy is not a "county officer."

Mechem on Public Officers, sec. 38.

Notwithstanding this, the deputy may by statute, in case of vacancy or absence or disability of the clerk, perform the duties of the clerk, meanwhile.

The deputy, in a proper case, acts in the name of his principal, or in his own name, as in the executing of tax deeds.

Gilkey v. Cook, 60 Wis. 133.
Huey v. Van Wie, 23 Wis. 613.

Under the prescribed conditions, the deputy may do the duty *pro hac vice* of the county clerk, who *is* a county officer. But the deputy's position is not a county office nor he a county officer, as before stated.

Jeffries v. Harrington, 17 Pac. Rep. 505 (Colorado).
Warwick v. State, 25 Ohio St. 24.

And a *woman* may hold a deputy clerkship, although not a qualified voter.

Ibid.

"The office of county clerk is wholly ministerial, and when the law provides that a ministerial officer may appoint a deputy, for whose acts he and his sureties are responsible, and does not limit or restrict him as to whom he appoints, he has authority to appoint whomsoever he pleases. The person so appointed acts for him; or, in other words, he acts through his deputy. His choice is not confined to any race, sex, color or age."

Wilson v. Newton, 87 Mich. 493.
S. C., 24 Am. St. Rep. 173.

County officers, in this state, are such as are named in section 698, Revised Statutes 1878. See the list there compiled.

This must at least be said of a deputy county clerk, that he is entitled to neither fees nor salary by law. He is not elected; he is simply appointed by the clerk.

R. S., sec. 694.

The clerk pays him out of his own pocket, and may, doubtless, contract with the deputy to pay him like any other hired man, for a specified term of service, as for a year; at the end of the year, the contract relation would terminate and the clerk might hire and appoint another deputy.

And if there was any fault in D. C. Relf's appointment, it was at most but an irregularity which the statute of limitations has buried along with the rest.

"The deed is made evidence of the existence of facts essential to its execution, including the contingency which authorized the deputy to act."

Huey v. Van Wie, 23 Wis. 613.

The claim that the tax of 1866 was paid.—It is objected that Mr. Gates, county treasurer in 1866, was allowed to explain that the ditto marks in the delinquent return were used as a check mark, and did not show payment of the tax. The book was only presumptive evidence of the facts therein stated.

R. S. 1878, sec. 4162.

Parol evidence may explain what the ditto marks meant.

Lessees of Atkinson v. Cummins, 9 How. 479.
Woodman v. Clapp, 21 Wis. 350.
Stringham v. Oshkosh, 22 Wis. 326.
Orton v. Noonan, 25 Wis. 672.

This argument is a pure quibble, worthy of the authors of the theory that the rules of grammar require verbs in the singular number as predicates for nouns in the plural number. Equally weighty are the assertions that the tax of 1866 was redeemed and the description of the land erased from the tax certificate. If the tax was *paid*, how could it be *redeemed?* If it was both *paid* and *redeemed*, how could there be a *certificate of sale* from which to *erase* the description?

It is respectfully submitted that the attempt of appellant to get something for nothing, and to take advantage of the outlay and business prudence of the appellee, should be disappointed by an affirmance of the decree.

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OCTOBER TERM, 1894.

No. 138.

THOMAS BARDON,
APPELLANT,

vs.

LAND AND RIVER IMPROVEMENT COMPANY.

Reply Brief for Appellant.

W. C. SILVERTHORN,
M. A. HURLEY,
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Counsel for Appellant.

WASHINGTON, D. C.:
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Reply Brief for Appellant.

I.

Counsel for appellee say (page 2 of their brief) "neither he (appellant) nor his grantors ever paid a cent of tax" upon the land in suit; "never paid any taxes upon it" (page 24). They also ask (page 31), "When did he set up a claim?" We submit the following statement, in chronological order, of facts shown by the record in this case, as a sufficient reply to these and some other misleading statements in brief of appellee.

1856, August 1. Ray, the Government patentee, made contract to convey the land to Augustine and Benjamin Chester. (Record, pages 1 and 2.)

1857. Land assessed to A. Chester, of Chicago, and tax, $10.58, paid by "E. W. A." (Record, p. 177.)

1858. Sold in 1859 to C. S. Freeborn for tax of 1858. (Record, p. 177.)

1861, 1862, and 1863. Taxes redeemed by Thomas A. Kiley. (Record, pp. 177, 178.)

1864. Tax paid by J. Newton.

1865. Tax paid by T. A. Kiley. (Record, 177.)

1866. Tax "paid July 22, E. W. A." (See Record, pp. 72, 73; also Ex. 4–9 on p. 179; also Ex. 4–13 on p. 181, "Taxes unpaid for previous years," none up to 1869; also tax certificate No. 118, p. 78, and notes at bottom of page showing these lands erased from body of certificate.) This is the tax upon which complainant's oldest tax deed is based, viz:

1870, September 5. Date of oldest tax deed to Hiram Hayes.

1873 and 1875. Land assessed to Hiram Hayes.

No assessment or tax roll for 1870, 1871, 1872, 1874, OR 1876. (Record, pp. 181 to 184.) The second tax deed is based upon tax of 1876.

1878, June 22. Hiram Hayes paid the tax of 1876 by settlement of his bill against the county. (Record, 81 and 82, Exhibits J and K, and testimony of Lagro, p. 73 of Record.)

1879, November 25. Hiram Hayes makes and files with county clerk his affidavit that his bill "has been paid by being turned on account of *affiant's taxes.*" (See Exhibit K, pages 81, 82; see also references to record in principal brief for appellant, 57, 58, showing that tax of 1876 upon the land in suit was paid.)

1877, January 4. Deed from James Bardon to Thomas Bardon (appellant). What title James Bardon had at this time is not shown by the evidence, but complainant's bill alleges that he had purchased a tax title from Thomas A. Kiley. (Record, p. 4.)

1878, March 6. James D. Ray, the patentee, quitclaimed to James Bardon, a brother of the defendant.

1883, June 13. Complainant purchased the Hayes tax title, paying "actual cash." (Appellee's brief, p. 7.)

1889, October 13. Complainant began the building of a *house* upon the land, and upon the same day the *house* was completed, and Darley took possession of it for the company. (Record, 39, 40.)

1889, November 1. Bill of complaint filed in present suit. (Record, p. 1.)

1890, June 30. Ejectment suit brought in State court by defendant herein against complainant herein. (Record, p. 15.)

II.

Although appellee's counsel had our brief some five weeks before they replied to it, they have failed in a remarkable degree to understand it, and have made many misstatements of our positions, and of the questions involved, replying in many cases to positions which we do not take, and failing to meet the real questions presented in our brief.

A. This point, pages 22 to 24 of our principal brief, is misstated upon page 31 of appellee's brief. Our point is that an action by a tax-deed claimant *against the former owner or his assigns* can only be brought within three years after the date of the tax deed, under section 25, chapter 22, G. L. 1859, which was in force when both of complainant's tax deeds were issued, and is yet in force, as section 1197 R. S. of Wisconsin. We do not say that the tax-title claimant might not have brought an action, under section 3186, against persons other than the former owner or his assigns.

B. The bar of the three-years statute of 1859 is so

clear against complainant that we do not care to add anything to the discussion of the ten-year limitation.

C. This point, pages 26–30 of our principal brief, is misrepresented upon page 16 of appellee's brief. We do not claim that tax deeds are not *prima facie* evidence of the regularity of proceedings. We do claim that, under the statutes quoted in our brief, the appellee's tax deeds were not evidence of their own execution, and hence were not evidence at all until rendered admissible as evidence by the usual proofs, and by the further proofs of requisites of execution, under statutes quoted upon pages 29 and 30 of our former brief.

D. This point is upon pages 30 to 41 of our former brief. The reply is upon pages 23 to 25 of appellee's brief and consists of excuses for the introduction of evidence by complainant, which showed that its tax deeds were void. They excuse themselves for introducing a record showing that the assessment of 1866 was not made by the assessor, by saying that they were obliged to introduce this record in order to show that in that year the town of Superior assessed the whole county of Douglas. We submit, first, that counsel has "jumped out of the frying-pan into the fire," and, second, that an assessment by "the clerk" is not an exercise of jurisdiction, but rather a failure of jurisdiction.

They attempt to excuse themselves, on page 24, for introducing evidence as to the tax proceedings upon which their tax deeds were based, by saying that they were trying to show that "the original owner, Ray, and his grantees" abandoned the land and "never paid a cent of tax upon it." That is surely a new method of proving a tax title. It has not been adopted in Wisconsin yet. But what did the evidence in question show? The evidence is referred to in the chronological statement of facts at

the beginning of this brief, and shows that the first tax was paid by "E. W. A."; that the tax of 1866, upon which the oldest of the complainant's tax deeds is based, was also paid by "E. W. A."; that the intermediate taxes, except the tax of 1858, were paid by Kiley, except tax of 1864, paid by Newton. (Kiley is supposed to have had a tax deed upon tax of 1858, and bill of complaint alleges that he had, and that such title was transferred to defendant.) It further appears that there were in 1869 no unpaid taxes against the lands. It is reasonable to suppose that "E. W. A.," who paid the taxes in 1857 and 1866, was paying them for Chester, who lived in Chicago. All these payments of taxes will, without proof, be presumed to have been made in behalf of the person who at the time owned the land.

Lewis v. *Disher*, 32 Wis. 504.

What, then, becomes of counsel's excuse for proving the tax and tax sale to be void, worthless though the excuse would be if true?

Was it necessary for them to introduce the sales-book of 1867 (complainant's "Ex. 4–10," p. 180 of pr. record), and to show thereby that the land is described as "S.E. ¼ 28, 49, 14, 25, 56," an utterly unintelligible description? The same exhibit shows redemption by Geo. Bosworth; was it necessary for counsel to show that? Surely it must have been a dire necessity that compelled them to put in evidence so damaging to their case.

Another excuse which they offer for the introduction of evidence of the tax proceedings is that they wanted to prove that there were taxes levied upon the lands for certain years before and after the tax deeds; that the former owner had not paid the taxes for certain years antecedent to the tax deeds, and that the tax-deed claimant had paid

them for certain years subsequent; that this was necessary in order to prove the allegations of the bill and to make the statutes of limitation run in favor of the tax deeds. Was it necessary for them to prove the taxes upon which the tax deeds are based, and the non-payment thereof, otherwise than by the deed itself? The excuse begs the whole question. Complainant, under the rule of the Wisconsin court in the Robinhorst case, had the choice either to rely upon the tax deeds as evidence of the levy and non-payment of the taxes upon which they were based, or to attempt to prove the facts in some other way. They chose the latter course, and so waived the statute of limitations.

But if counsel express what they mean upon pages 24 and 25 of their brief, they contend that they could not waive the statute of limitations *after it has run in their favor*. Every waiver of the statute of limitations necessarily occurs after it has run; there is no statute to waive before that. The conclusive effect given to a tax deed by virtue of the running of the statute of limitations, or, in other words, the statute of limitations itself, can be waived just as easily as can the *prima facie* effect of the deed before the statute has run.

F. This point, pages 41–44 of our former brief, is replied to upon pages 20–23 of appellee's brief. We submit that an examination of complainant's Exhibit 6 (pr. record, pages 96–163) will show that counsel grossly overstate the facts when they say that from 1861 to 1866 the town of Superior "continued to exercise the fullest jurisdiction" over the territory of the town of Pokegema. Nor will said Exhibit 6 show that any jurisdiction of the sort was exercised "with the fullest consent of the people" of Pokegema; nor that "the inhabitants of that territory (Pokegema) immediately took part in the election of town

officers." The record does not show that a single inhabitant of Pokegema ever voted at any election held in the town of Superior.

Counsel upon page 22 of their brief, in effect, concede that section 674, R. S. of Wisconsin, does not help them unless the resolution of the county board can be construed as annexing Pokegema to Superior. We submit that question upon the argument already made.

G. Our point that the tax of 1866 was shown to be paid. (Pages 45 to 49 of principal brief.) Counsel in reply says (page 35): "Parol evidence may explain what the ditto marks meant."

The ditto marks are well-known characters in common use. They are used upon the same page where the ditto marks in question occur, and are there used to describe lands. As shown by the authorities cited in former brief, they have a known meaning, recognized by the courts.

The three Wisconsin cases cited upon page 35 of brief for appellee, Woodman *v.* Clapp, &c., merely follow the common rule as to written receipts, and do not in anywise show that parol evidence will be admitted to the effect that "Paid July 28th, E. W. A.," means and was intended to mean the opposite of what it states. It is doubtless true that a record of payment of the tax may be shown to be untrue by introducing evidence *aliunde* of non-payment. It would take pretty strong and clear evidence to falsify the record, but that is another case and question altogether. There is no such evidence here. The attempt made in this case was to prove that the record itself means the reverse of what it says.

Counsel says our argument under this head is "a pure quibble." Any argument, good or bad, can be called a quibble if counsel feel disposed to call it so. And counsel, being, perhaps, in a competitive mood, immedi-

ately exhibit their own quibbling skill as follows: "If the tax was paid, how could it be redeemed? If it was both paid and redeemed, how could there be a certificate of sale from which to erase the description?" "Paying" and "redeeming" may not mean precisely the same thing in tax law, yet it would be easy enough for taxing officers to use them as synonomous. A tax certificate always precedes what is technically known as "redemption." Lands are often sold for taxes after the tax has been paid. This is especially the case in large counties like Douglas, when they are new, because very large delinquent lists are returned to the county treasurer for tax sale, and the officers do not have time to do their work as carefully as in old counties where the delinquent lists are small. Sometimes such a mistake is discovered in time to prevent the issue of a tax deed; sometimes it is not. Upon page 180 of printed record complainant's counsel proved by their "Ex. 4–10" that the lands were sold for the taxes of 1867 and 1868, and yet the two following exhibits, Ex. 4–11 and Ex. 4–12, show that the same taxes were paid in 1868 and 1869, months before September, the time when the respective tax sales would be made. Counsel might have answered their own quibbling questions if they had made a slight examination of their own proofs. "How could it be?" they ask. It could be by just such mistakes as taxing officers not infrequently make. We might ask counsel, "How could the tax of 1869 be $73.48 according to your 'Ex. 4–13,' $24.65 according to your 'Ex. 4–14' (p. 181 of Record), and $28.95 according to your Exhibit E?" (P. 46 of record.) It could only be because the county officers of Douglas county were very prone to make mistakes, as almost every record or copy of record introduced by complainant's counsel abundantly shows. They have not got over being

careless yet, as will be seen by comparing complainant's "Ex. 4–22" (p. 184 of record) with the testimony of Wm. J. Leader on page 70 of record, where he reads the same entry from the original book. It will be seen that the book contains no column headed "to whom sold," nor any name of purchaser at the tax sale, yet both of these things appear in the certified copy of the entry. ("Ex. 4–22," p. 184 of record.)

Such things as this are sometimes attributed to motives less innocent than mere carelessness. It is easy, through carelessness, to leave something out of copy which is in the original, but it does not generally happen, *through carelessness*, that important things appear in the copy which are not in the original.

These facts answer well enough counsel's question, "How could it be?" and show that it is not at all wonderful that lands should be sold after the tax had been paid, or tax deeded after the lands had been redeemed. *A little carelessness or a little dishonesty is all that is needed.*

H. This point—that the tax deed of 1870 is void upon its face—(pages 49–54 of former brief) is considered on pages 19 and 20 of appellee's brief. Counsel there sees fit to answer it first by saying that it is technical and absurd, second by misstating it, and lastly by answering their own misstatement. We do not claim that the statute form requires that the clauses enclosed in parentheses should be inserted in a tax deed *with* the others. We claim that the officer executing the tax deed must choose between the alternative statements and make the one warranted by the facts. *We say that in no other possible way can he comply with the statute.* We do not say "a statutory form in certain words means one thing and a deed in precisely the same words means a totally different thing." We say that

the deed in question—the deed of 1870—does not follow the statutory form. It follows the statutory form too literally to follow it correctly. The form was designed to leave something to the brain of the county clerk and could not be complied with by a mere machine. We make substantially the same criticism that the supreme court of Wisconsin made in *Miller* v. *Munson* (34 Wis. 579), where an affidavit for attachment followed the statute *literally*, and was for that reason held bad, as not following the spirit and meaning of the statute.

Counsel say this point is technical and absurd. Almost all the decisions holding tax deeds and other tax proceedings void under tax laws for defects appearing upon their face rest upon similar objections. Surely nothing could be more technical than the distinction made by the Wisconsin supreme court in one of the three cases cited on page 65 of our former brief, where that court held an affidavit of posting notices of tax sale to be void because it stated that the notices were posted "at" the town instead of "in" the town, the word "in" being the word used in the statute. Counsel may call objections of this sort "technical" and "absurd," but the courts hold that they are *substantial;*—that when the statutes prescribe a form to be observed the form becomes substance.

Lain v. *Cook*, 15 Wis. 488.
Wakely v. *Mohr*, 18 Wis. 321.
Hopkins v. *Scott*, 86 Mo. 140.

J. Former brief, pp. 54–56. We submit this point upon the argument already made.

K. This point, former brief, pp. 57–59, is misstated by counsel upon page 30 of their brief, but the misstatement is so obvious that it need only be mentioned. We submit the point upon the argument already made in this brief, under head I, and in the former brief.

L. The argument as to the recording of the tax deeds. (Our former brief, 60–73, and appellee's brief, pp. 7 to 18.) Counsel for appellee still insist, as they did in the court below, that the question is whether the indexing and the records of the deeds at large are "constructive notice" or "sufficient to put an examiner of the records upon inquiry." We may reply by quoting the language of the Wisconsin supreme court in *Lander* v. *Bromley* (79 Wis. 372), where, upon a precisely similar question, the court says: "*The question is not one of notice, actual or constructive, but whether there was a substantial record which set the statutes of limitation in motion.*" Also the case of Hiles *v.* Atlee (80 Wis. 219), where the court holds that the same rule of strict construction applicable to other tax proceedings applies to the tax proceeding required to change the *lien* of an unrecorded tax deed to an absolute title, viz., recording in the office of the register of deeds. Avoiding any repetition of argument upon this point, we desire to clearly point out the issue between us and counsel for appellee, which is simply whether the purpose of recording a tax deed in Wisconsin is solely to give constructive notice, or whether its main purpose is not to vest the legal title in the tax-deed grantee. Counsel for appellee appear to rely very much upon a late case, *Hotson* v. *Wetherby* (60 N. W. Rep. 423), which they cite in several places in their brief. (See pages 7, 18, 26.)

In that case the court seem disposed to follow the "see record" cases. And while the late cases of Lander *v.* Bromly, and Hiles *v.* Atlee, are, in principle, utterly at variance with the "see record" decisions, it is, nevertheless, probable that court will adhere to that holding upon the rule of *stare decisis*, confining this departure from plain principles of law to the exact point upon which the decision was made in Oconto Company *v.* Jerrard, namely,

to cases where the land was correctly described upon the record at large, and where the index contained the words "see record." This would not help complainant, because the index of the deed of 1870 neither describes the land nor uses the reference "see record," and because, although the index of the deed of 1882 does say "see record," the record of that deed describes the land as "S.E. ¼ 28, 49, 14," which is no description of land recognized by the Wisconsin law; also because of the other defects mentioned in our former briefs.

The use of such abreviations as N.E., S.E., omitting the figures ¼, has, since a very early day, been expressly permitted by statute in Wisconsin in tax proceedings; hence the argument of counsel based upon decisions of the Wisconsin court upholding such descriptions is inapplicable to a description omitting the words "section," "town," and "range," in connection with the figures or numerals.

Counsel say the description S.E. ¼ 28, 49, 14 "is the common speech, the vernacular idiom." We will ask counsel if they ever saw such a description in an ordinary conveyance, to say nothing of a tax deed. There may be a good many expressions in the "vernacular idiom" that would hardly do in tax proceedings and tax records. Plain language, without conjecture or enigma, is always necessary in documents of enough importance to pass title to real estate.

Upon the question of the so-called "copy of general index," and its effect, counsel have fallen into some errors of statement, and have omitted to consider the question of the certificates required by the different statutes. But all we desire to do here is to make clear and distinct the issue between us and counsel for appellee. Our position is that the copy, so called,

cannot legally be treated as an original—that there cannot be two originals. Every owner of land whose deed is properly indexed in the original is entitled to have the original remain the original, and cannot be deprived of that right and of the protection which it may afford him against subsequent claimants by the act of the register of deeds or of any one else who may have the power to make another record years afterwards and attempt to impose the new book upon the public as an original. The original is the original always. The copy, if it is a true copy (as the one in question is not), and if it is duly authenticated as required by statute (as the one in question is not), will be treated as a copy, and must always be a copy. If not true, or if not duly authenticated, it will not be treated even as a copy, much less as an original. If any correction is necessary, it must be made in the original. Making such corrections merely in the copy, as was done in this case, amounts to nothing. We believe these propositions to be so self-evident that a bare statement of them is sufficient to commend them to the good judgment of this court.

As to the statute of limitations in aid of void tax deeds, the bald assertions of the levy of taxes and payment of taxes made upon pages 27 and 28 of appellee's brief are disproved by complainant's own proofs. (See our former brief, pages 74, 75.)

III.

We notice here miscellaneous errors in appellee's brief not already considered.

1. Page 8. References of appellee's counsel to cases of Lander *v.* Bromley and Hiles *v.* Atlee. Counsel there say that in the former case "no question of due recording

was presented;" and they say as to the latter case: "There was no general index whatever." Both statements are entirely wrong.

In the case of Lander *v.* Bromley the question of due recording was not only presented, but it was the only question presented. The tax deed was valid upon its face, but was so recorded as to appear to be void upon its face. The court treated the case precisely as if the original had been void upon its face. In the case of Hiles *v.* Atlee there was a general index, but the grantees instead of the grantors were entered in alphabetical order therein. The grantors were also entered but not alphabetically as required by statute (see sec. 142 in our former brief, p. 19), and for this defect the whole record was held void.

Referring to one of our objections to the tax deeds, namely, the fact that the tax records were kept in the wrong custody, counsel say (page 32): "The supreme court of Wisconsin found no difficulty in sustaining two Douglas county tax deeds with the records in the same custody," and cite the two Wetherby cases. The question was not passed upon, presented, nor even mentioned in either case.

Upon page 9 counsel say: "In the case at bar *the deed* was fully and accurately transcribed in the record book." Not true as to either deed, we think. Certainly not true as to the deed of 1882.

IV.

Upon pages 10 and 11 counsel for appellee cite against us the decision of the district judge in the present case—the decision from which this appeal is taken. This is amusing surely. We have a good deal of regard for His Honor Judge Bunn, but, with all due respect to him

and for his decisions, we must object to having his decision in the present case received as an authority upon this appeal. We do not intend to make any critical examination of the opinion of the district judge in this case. We expect this court will look at it carefully, and will find that his honor, on some account—probably, over-pressure of work—failed almost entirely to get hold of the case. Fully half of the opinion is devoted to the question of the jurisdiction of courts of equity and United States courts, which was not at all seriously contested, and the greater portion of the remainder is devoted to the question of what sort of record of a deed will give constructive notice or put parties upon inquiry, which, under the later decisions of the Wisconsin court, is not, as has been shown in our former brief, the real question involved in the recording of a tax deed. Upon that question it is easy to see that his honor, the district judge, went a pretty long way in disregarding the statute requiring an index to be made as a part of the work of recording a tax deed. This appears from the fact that his honor, in the haste with which he was obliged to decide the case, failed to find out what the index really was, and thought that the right-hand half of the index was the whole of it. Nevertheless he held it to be good without any entry of date of reception, name of grantor or grantee, or anything else entered upon the left-hand half of the double page.

V.

Counsel for appellee apparently rely, more than upon anything else, upon the fact that their client and its grantor paid taxes upon this land for a good many years. This is urged upon pages 2, 16, 18, and 30 of their brief, and there and elsewhere, up to the very closing paragraph of

their brief, they urge that the court should take this land from the former owner and give it to their client, because the latter has expended a good deal of money in Superior in putting up buildings for itself there, which has increased the value of this property and other property not owned by it in that town.

Payment of taxes for a long term of years coupled with valuable and permanent improvements *upon the property in question* might, in a proper case, be considered as elements in a defence of estoppel by laches against a plaintiff who was asking the aid of a court of equity. We never heard that a defendant who does not come into a court of equity voluntarily, but is forced to come in, can be estopped in any such way from setting up his defence. If complainant does not want the defendant to make a defence, then he must not sue him. If he sues him, the right to defend follows necessarily. It is different with suitors. They come into court voluntarily, and so the court may say to them, "You should have come here sooner; you have delayed too long." There are many such cases where questions of constructive fraud, actual fraud, imbecility, and insanity of grantors have been raised by heirs long after grants were made by their ancestors, and it is in such cases that the defence of laches is oftenest applied, and always, of course, against the complainant, because it is purely a "defence," and is by no means in any case a "cause of action."

In this connection appellee's counsel also strenuously urge that their client has some sort of equity, which should be considered in this case, resting upon the fact that it paid $6,400 "*actual cash*" for these lands (page 7) and because it and its grantor paid or redeemed the taxes for a good many years. Neither of these considerations could have any weight in this case even if the complain-

ant was so situated that it would lose what it has paid out. But as to the "$6,400 actual cash," it is protected by the covenants of warranty in its deed; and as to the taxes, if it has lost the right to recover any part of them, it is because it has permitted the statutes of limitation to run against the remedy therefor given by the statutes of the State. This contention of counsel amounts to neither more nor less than contending that their client should derive an advantage from having permitted those statutes to run against it, and should now have land worth $160,000 instead of the small amount of taxes which it may, through its own neglect, have lost the right to recover. Taxes have not been high in Superior until recent years, and these can be recovered by complainant under the Wisconsin statutes in the pending ejectment suit in the State court.

That suit was commenced June 30, 1890 (Record, page 15), and the complainant purchased the lands June 13, 1883. Complainant can recover in that suit six of the seven years' taxes which it paid.

Respectfully submitted.

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